

**ENFORCING AND IMPLEMENTING THE LAW ON DEFILEMENT IN  
KENYA: A CRITIQUE**

**BY**

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## DECLARATION

I, **CHRISTINE NJERI KARA**, do hereby declare that this is my original work and the same has not been submitted and is not currently being submitted for a degree in any other University.

.....  
**CHRISTINE NJERI KARA**

This thesis has been submitted for examination with my approval as the University Supervisor.

.....  
**MS. JOY K. ASIEMA**

## **DEDICATION**

I dedicate this work to my late mother Mrs. Theresia Mwihaki Kara for teaching me the path of excellence and urging me to tackle anything in life with dedication. Thanks for teaching me how to live and let others live. May God rest your soul in eternal peace.

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## LIST OF CASES

1. *C.K.A (a child) through Ripples International as her guardian and Next of Friend) & 11 others vs. Commissioner of Police/Inspector General of National Police Service & 3 Others* [2013] eKLR.
2. *Bariki Leakey Oyoo vs. R* [2013] eKLR.
3. *B.W.S. vs. R*, [2013] eKLR.
4. *Flappyton Mutuku Ngui vs. R*, Machakos High Court Criminal Appeal No. 296 of 2010.
5. *Hamisi Ngoli Kusala vs. R*, [2013] eKLR.
6. *John Kioko vs. R*, Makueni Principal Magistrates Court Criminal Case No. 11 of 2012(unreported).

## **STATUTES**

1. African Christian Marriage and Divorce Act Cap 151 Laws of Kenya
2. Constitution of Kenya, 2010
3. Criminal Procedure Code, Cap 75 Laws of Kenya.
- 4.. Evidence Act, Cap 80, Laws of Kenya
- 5 Marriage Act Cap 150 Laws of Kenya.
6. Marriage and Divorce Act Cap 157 Laws of Kenya
7. Penal Code, Cap 63, Laws of Kenya
8. Sexual Offences Act No. 3, 2006, Laws of Kenya
9. Witness Protection Act, Cap 79 Laws of Kenya

## **TREATIES AND CONVENTIONS**

1. African Charter on Peoples and Human Rights (1986)
2. African Charter on the Rights and Welfare of the Child (1999)
3. Convention on the Elimination of All Forms of Discrimination Against Women (1981)
4. Convention on the Rights of the Child (1990)5.
5. International Covenant on Civil and Political Rights (1976)
6. Optional Protocol to the International Covenant on Civil and Political Rights (1976)
7. Universal Declaration of Human Rights (1948)

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## **LIST OF ABBREVIATIONS**

<b>ACCORD</b>	Agency for Cooperation and Research in Development
<b>ACRWC</b>	African Charter on The Rights and Welfare of The Child
<b>AIDS</b>	Acquired Immune Deficiency Syndrome
<b>CEDAW</b>	Convention on The Elimination of All Forms of Discrimination Against Women
<b>DCI</b>	Director of Criminal Investigations
<b>DNA</b>	Deoxyribonucleic Acid
<b>DPP</b>	Director of Public Prosecutions
<b>GVRC</b>	Gender Violence And Recovery Center
<b>HRC</b>	Human Rights Committee
<b>ICCPR</b>	International Convention on Civil and Political Rights
<b>KNCHR</b>	Kenya National Commission on Human Rights
<b>KNHREC</b>	Kenya National Human Rights and Equality Commission
<b>NAASO</b>	National Authority on the Administration of the Sexual Offences
<b>NGOS</b>	Non-Governmental Organisations
<b>ODPP</b>	Office Of The Director Of Public Prosecutions
<b>PRC</b>	Post Rape Care
<b>SOA</b>	Sexual Offences Act
<b>SLO</b>	State Law Office
<b>UDHR</b>	Universal Declaration of Human Rights
<b>WCSAP</b>	Washington Coalition of Sexual Violence

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background

Sexual violence is a violation of human rights. As a form of gender-based violence, sexual violence has been defined as “any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffick a person’s sexuality, using coercion, threats of harm or physical force, by any person regardless of relationship to the victim, in any setting, including but not limited to home and work.”<sup>1</sup> It is manifested in various forms including but not limited to rape, defilement, sexual assault, indecent acts. There is no safe place where one can be immune from sexual violence as it can happen in a bedroom, alleyway or in a war zone.<sup>2</sup> Sexual violence against children is one of the most damaging forms of violence. It is usually manifested as defilement or attempted defilement and is a direct violation of Articles 19, 32 and 34 of the UN Convention on the Rights of the Child 1989.

Defilement is defined as an act which causes penetration with a child.<sup>3</sup> Penetration is the partial or complete insertion of the genital organs of a person into the genital organs of another person.<sup>4</sup> Simply put, defilement is having sexual relations with a person who is below eighteen years of age whether with or without their consent. In Kenya, the offence of defilement is graduated according to the age of the complainant. Where the complainant is aged eleven or less, the offence carries a maximum of life imprisonment. For a victim who is between twelve and fifteen years, the minimum sentence is twenty years. For a victim between sixteen and eighteen years, the minimum sentence is fifteen years.<sup>5</sup>

Defilement has various effects on the victims. According to the World Health Organisation’s guidelines for medico-legal care for victims of sexual violence, consequences include; unwanted pregnancy, sexually transmitted infections(STIs), Human Immunodeficiency Virus/ Acquired

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<sup>1</sup>United Nations General Assembly (UNGA) Inter-Agency Standing Committee Guidelines for Gender-based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies (Geneva: Inter-Agency Standing Committee, September 2005.)available at<<http://www.humanitarianinfo.org/iasc/downloadDoc.aspx?docID=4402>>last accessed 9/9/13

<sup>2</sup>Kim Athuuy Seelinger, et al, *The Investigation and Prosecution of Sexual Violence: Sexual Violence and Accountability Project Working Paper Series*, Human Rights Center University of Berkley, 2011, p.1.

<sup>3</sup> Section 8 (1), Sexual Offences Act No. 3 of 2006 (SOA).

<sup>4</sup>Section 2, SOA.

<sup>5</sup>Section 8, SOA.

Immunodeficiency Syndrome (HIV/ AIDS) and increased risk for adoption of risky sexual behaviours. The mental health consequences of sexual violence can just be as serious and long lasting. Victims of sexual abuse who are children, for example, are more likely to experience depression, substance abuse, post-traumatic stress disorder (PTSD) and suicide in later life than their non-abused counterparts.<sup>6</sup>

Due to the tender age of the victims, most of them have both physical and emotional wounds inflicted upon them. According to a report by Akumu, Amony and Otim<sup>7</sup>, the major effect of defilement on victims is physical injuries. This is mainly because the sexual organs of the victims are usually not fully developed leading to tears on the birth canal. This complicates future health and sexual relations for the victim. Another major effect of defilement is unwanted pregnancy and sexually transmitted infections including Acquired Immune Deficiency Syndrome (AIDS). Other effects include humiliation and shame which leads to isolation and trauma on the victim.

There are myriad causes of defilement. However, the main cause of defilement can be looked at in terms of the value attached to women in the society. There is usually a deep seated feeling that women are of lesser value than men<sup>8</sup>. Tamale contends,

“...in virtually all societies around the world, even in the liberal industrialised democracies in the west, women still labor under an avalanche of disadvantages. The patriarchy, a system of social ordering that has historically placed the male as a superior of the female, is the conceptual justification for the subordination of women to men. As a result, discrimination and deprivation has been the lot of the majority of the world’s women.”<sup>9</sup>

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<sup>6</sup> World Health Organization (WHO), “Guidelines for medico-legal care of victims of sexual violence”, (Geneva: WHO, 2003).p.10, available at <<http://whqlibdoc.who.int/publications/2004/924154628X.pdf>> last accessed 25/8/13.

<sup>7</sup> Akumu, Okot, Isabella Amony & Otim Gerald, *Suffering in silence: a study of sexual and gender based violence (SGBV) in Pabbo Camp, Gulu District, Northern Uganda* (2005) available at <[http://www.internaldisplacement.org/8025708F004CE90B/%28httpDocuments%29/7858DAA74DCD4FAF802570B7005A589C/\\$file/SGBV+Report-Gulu.pdf](http://www.internaldisplacement.org/8025708F004CE90B/%28httpDocuments%29/7858DAA74DCD4FAF802570B7005A589C/$file/SGBV+Report-Gulu.pdf)> last accessed 19/8/13.

<sup>8</sup> Charlotte Bunch, “The Intolerable Status Quo: Violence against Women and Girls”, in UNICEF, *The Progress of Nations Report* (1997) p.44, available at <<https://www.amherst.edu/media/view/230636/original/the%2Bintolerable%2Bstatus%2Bquo.pdf>> last accessed on 11<sup>th</sup> January 2012.

<sup>9</sup> Sylvia Tamale, *When Hens Begin to Crow: Gender and Parliamentary Politics in Uganda*, West view Press, Boulder, USA (2009.)

The patriarchal system described above complicates matters when it comes to dealing with the consequences of sexual violence as the victims have nowhere to turn to as the systems have no place for them. The situation gets more complex when the sexual abuse is directed towards children and especially girls who have no voice and though the parents normally pursue their rights, the mothers who are usually at the forefront advocating for them face systematic discrimination and silencing by the systems in place.

In Kenya, despite the enactment of the Sexual Offences Act of 2006 which increased the sentences for sexual offenders, there has been a marked increase in the reported cases of sexual violence especially against children. According to police statistics<sup>10</sup>, in the year 2005, there were 1067 reported cases of defilement. In 2006 the figures went up to 1445 and in 2007 to 1984. In 2008 there was a slight decrease to 1849. In 2009, the figures stood at 2242 while in 2010 and 2011 the figures soared to 3273 and 3191 respectively.

The trend shows that there has been an increase in the number of reported defilement cases yet many more are unreported. The under reporting of sexual violations can be explained in many ways. The World Health Organisation (WHO) attributes the non reporting to “fear of retribution or ridicule, and a lack of confidence in investigators, police and health workers”.<sup>11</sup> A report by the some human rights quarters blames underreporting to the

“...cultural inhibitions against publicly discussing sex, particularly sexual violence; the stigma attached to rape victims; survivors’ fear of retribution; police reluctance to intervene, especially in cases where family members, friends, or acquaintances were accused of committing the rape...”<sup>12</sup>

The lack of confidence in investigators, police and health workers is an indictment on the enforcers of the law in relation to sexual offences which needs to be further investigated to find solutions that can enhance access to justice by the victims.

Cases reported to the Gender Violence and Recovery Centre (GVRC) have also shown an increase largely due to advocacy of the centre for victims to seek medical help. From the year 2006 to 2012 the cases reported are represented in the table below.

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<sup>10</sup> Police Annual Crime Report 2011 available at [www.kenyapolice.go.ke](http://www.kenyapolice.go.ke) last accessed 14/12/12

<sup>11</sup> Supra note 5 p.18.

<sup>12</sup> United States Department of State, Kenya 2012 *Human Rights Report*, USDOS, 2013 P.38 also available at <<http://www.state.gov/documents/organization/204343.pdf>> last accessed 26/8/13.

Sexual offences cases reported to the GVRC from 2006 to 2012.<sup>13</sup>

Year	Cases Reported
2012	2532
2011	2524
2010	2100
2009	2398
2008	2338
2007	2039
2006	1671

It would have been expected that with the introduction of minimum sentences which are very harsh, offenders would be deterred before they contemplate such actions. The increase in the sexual violations of children testifies to the fact that the law in itself is not sufficient to eradicate the vice of defilement. It is imperative that a wholesome approach is taken to ensure proper enforcement of the law to compliment it in its quest to deal firmly with the menace of defilement.

According to Tonry and Farrington<sup>14</sup>, until very recently, the primary initiatives launched in the name of crime prevention consisted of changes in criminal laws, enforcement techniques and sentencing policy. These are all important prevention efforts; however they neglect many factors known to influence crime and delinquency which if addressed, promise to have important preventive effects. To a large extent, the researcher concurs with the proposition because efforts at preventing child abuse in Kenya have greatly involved the overhaul of the penal laws dealing with the vice. This culminated in the enactment of the Sexual Offences Act. The Act provides for mandatory minimum sentences thus reducing the sentencing discretion of the courts.

According to Finkelhor *et al*, “The most elemental thing the criminal justice system can do about a crime is to increase its detection and disclosure and the likelihood that the offender will

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<sup>13</sup> Gender Violence Recovery Center Annual Report 2011-2012, P. 6, available at <http://www.gvrc.or.ke/phocadownload/annual%20report%202011-2012.pdf> last accessed 14/8/13.

<sup>14</sup> Tonry, M. and Farrington, D.P. (1995, Eds.) “Building a Safer Society: Strategic Approaches to Crime Prevention”, In, *Crime and Justice*, vol. 19. Chicago: University of Chicago Press,p.2.

be arrested and prosecuted.”<sup>15</sup>It is important that the Sexual Offences Act is interrogated to evaluate its effectiveness in increasing the detection and effective prosecution of those who defile children in Kenya.

The Sexual Offences Act of 2006 is to a large extent a good law. It has tried to cater for all the elements of offences that were initially left out in the Penal Code. Effective law enforcement and implementation should result in reduced incidences of defilement. This has not happened with regard to defilement. Thus, there is need to investigate why and whether the deficiency can be corrected and consequently result in reduced incidences of defilement. The researcher posits that implementation of the Sexual Offences Act has not been satisfactory and this has led to the increase in defilement cases.

According to a report by Gender Violence and Recovery Centre (GVRC),<sup>16</sup>poor law enforcement and a permissive society where adults are indifferent to the plight of the vulnerable have contributed to the rising incidents of sexual violations. The Centre’s Director opines that rape and defilement have been “normalised” and this explains why most defilement cases are unreported.<sup>17</sup>The way victims view the offence and how it has been handled in previous instances determines their own attitude to the offence. Where they have witnessed perpetrators go scot free, they believe nobody will avail them justice. This gives offenders an upper hand in incidences of defilement especially because victims, once threatened, keep quiet and suffer in silence.

When a victim is defiled, the first stop is at the police station. In many stations, there is a gender desk where victims can report and get directions on what needs to be done. However, many of these desks are unattended and this means the victim will be processed through the main report office. If the report officer is a male, the issue of whether a victim will trust the officer enough to disclose all the facts of the offence will have a great effect on any of the charges that may be filed in court.

The success of the report made by a victim of defilement depends to a large extent to the attitude of the officer handling the offence. If the officer is of such a view, the case may not be pursued.

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<sup>15</sup>David Finkelhor, “The Prevention of Childhood Sexual Abuse”, *The Future of Children*, VOL. 19 / NO. 2 / FALL 2009 available at [http://futureofchildren.org/futureofchildren/publications/docs/19\\_02\\_08.pdf](http://futureofchildren.org/futureofchildren/publications/docs/19_02_08.pdf) last accessed on 21/1/13.

<sup>16</sup>Supra note 9.

<sup>17</sup>Saturday Nation, May 4<sup>th</sup> 2013, p. 9.

Equally, where an officer believes that these are matters that can be solved domestically, such an officer will be amenable to the parties settling the matters out of court. This means that despite the SOA being a good law, its success will depend largely on the attitude that the people entrusted with enforcement attach to the offence of defilement.

Further to this, the community itself and its views of the offence equally matter. The stigma that follows incidents of defilement can be a contributor to the lack of reporting by victims or caregivers. The stigma also affects family honour. Parents may opt to silence the child in a bid to ensure they are not ridiculed in the society. Other parents will file the report with the police with a view to ensuring that pressure will build on the suspect to settle the matter out of court. Once the parents of the victim are paid, the victim is relocated to live with other relatives thus causing the case to collapse due to non attendance of the complainant. Once the investigator cannot avail the complainant, the case collapses. For victims who unfortunately conceive out of the defilement, there are instances when the parents arrange for the victim to be married off to the suspect. In such a case, the complainant is also made to disappear and the case collapses due to the absence of the complainant.

However, the justice system is to some extent proactive in some of the cited issues. For instance, a court in Tharaka-Nithi County, worried by the trend in sexual offences, has taken an initiative to involve the community elders in finding a lasting solution to the many sexual offences in the region. He cited the lack of witnesses in court as a stumbling block in the just conclusion of the matters. Of importance to this study is the fact that the court found that traditions and taboos of the community were frustrating the fight against the offences. The court noted that some clans in the area found it unacceptable to sue one of their own in such cases. They felt it would attract the wrath of their ancestors.<sup>18</sup>

In this aspect, it is evident that the court has noted that attitude of the community greatly affects implementation and enforcement of the Sexual Offences Act. In involving the elders, this invites the authority of the community which in some cases is more respected than the law. It is therefore imperative that a proper attitude of the offence of defilement is embraced by all parties to facilitate effective handling of the incidences of defilement.

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<sup>18</sup>Nation Correspondent, "Court Joins Elders in the Fight against Rape" *The Daily Nation*, Thursday May 30<sup>th</sup> 2013 p. 16.



A report by the Open Society Initiative for East Africa shows that mediation and arbitration by traditional leaders level provides a form of informal dispute resolution for Kenyans who do not have access to the formal justice system. While traditional justice can be gender-biased and suffer from other flaws, many prefer it not only because of the expense and unavailability of formal structures, but also because of the fear that going through formal courts will attract unwanted publicity and fuel discrimination and stigmatization against a complainant living with HIV or AIDS or those defiled or raped.<sup>19</sup> It is therefore imperative for formal justice system to be accessible to the people and most important to incorporate the informal justice players in training and awareness creation so that they uphold the rights of the victims. In all these aspects, what comes out clearly is that the attitude of the players, be it the law enforcement agencies, the community and the implementing arms etc are vital to the successful implementation and enforcement of the Sexual Offences Act. It is therefore important that a critical analysis of the laws and structures created by the Act is carried out and an assessment of how attitude affects the reduction of defilement incidences be carried out. This makes this study timely.

Of particular importance is the need to evaluate how non - state actors such as the communities within which the offences are perpetrated view the offence of defilement and how they engage to prevent the occurrence. This is especially in light of evidence that many perpetrators of defilement compromise the cases in cooperation with the parents or caretakers of victims by withdrawing the matters from the courts or by settling the same in traditional justice systems. According to a finding by the Kenya National Commission on Human Rights, (KNCHR)<sup>20</sup>, there are cultural norms that foster defilement against girls or rape in women.

For instance, amongst the Sabaot community, where a rape (defilement) occurs within the community by a known member of the family or clan, elders convene a meeting to resolve and cleanse the victims to avoid shame and stigma in a ceremony known as “to beat the leaves” or “*kepserogo*”.<sup>21</sup> Similarly, amongst the communities from Unguja District, whenever a young girl is defiled by a relative, the incident is considered as ‘*thuol odonjo eko*’ meaning that a snake has entered the gourd with milk. Whichever way they view the solution to the incident, there is need

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<sup>19</sup>Kristin Kalla and Jonathan Cohen, *Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and AIDS-related Legal Services*, Open Society Institute (2007) New York page 26, available at <http://kelinkkenya.org/wp-content/uploads/2010/10/Ensuring-justice-for-the-Vulnerable.pdf> last accessed 21/8/13.

<sup>20</sup>KNCHR, *Realizing Sexual and Reproductive Health Rights in Kenya: A Myth or Reality?* A Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya, April 2012.

<sup>21</sup>Ibid.

to ensure that neither the gourd is destroyed nor the milk poured.<sup>22</sup> For this society, both the victim and defiler are important to them and nothing should be done to prejudice any of them. This encourages retribution instead of punitive justice.

From these two communities' perspective, it is clear that neither of these two communities is likely to utilise the law when defilement occurs in their community as their culture exhorts them to amicably settle the dispute. There is therefore little opportunity for the victims to be heard or to be represented as the elders are often men and rarely women who can articulate the feelings of the girls.

Involvement of the communities in the fight against incidences of defilement is important as most of the strategies put in place are reactive and hence unable to prevent the occurrence of the incidences of defilement.

## **1.2 Statement of the problem**

In spite of the fact that there is now a comprehensive law in Kenya dealing with sexual offences and providing for enhanced sentences, there is still minimal progress being achieved in the reduction of incidences of defilement. There is need to analyse the extent to which the law on defilement is enforced and implemented by the institutions mandated to do so to find more effective ways of reducing defilement incidences in Kenya.

## **1.3 Objectives of the study**

The overall objective of this study is to identify the law on defilement in Kenya and to examine the effectiveness of the enforcement and implementation agencies.

The specific objectives are,

1. To examine the law on defilement in Kenya.
1. To analyse the institutional framework on implementation and enforcement of the law on defilement in Kenya.
2. To analyse the extent to which the law on defilement in Kenya is enforced and implemented and any limiting factors.
3. To make recommendations on how to effectively implement and enforce the law on

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<sup>22</sup> Supra note 19, p. 81.

defilement in Kenya.

#### **1.4 Research questions**

The primary research question that this research sought to address was: Is the law on defilement being enforced and implemented effectively so as to facilitate reduction in defilement incidences in Kenya?

The other questions flowing from the main research question are:

1. What is the law on defilement in Kenya?
2. What institutions are mandated to enforce and implement the law on defilement in Kenya?
3. To what extent is the law on defilement enforced and implemented in Kenya.
4. What factors undermine effective implementation and enforcement of the law on defilement in Kenya?
5. What measures can the state adopt to effectively implement and enforce the law on defilement?

#### **1.5 Hypotheses**

The study was guided by the following hypotheses;

1. Though to a large extent the law on defilement is adequate, its implementation and enforcement is ineffective.
2. There is need for institutional reform to enhance the implementation and enforcement of the law to reduce defilement cases.

#### **1.6 Justification for the study**

In Kenya, there are laws that have been enacted to deal with the incidences of defilement, notably the Sexual Offences Act. The Act has been in place for about seven years and it is critical that an appraisal of its enforcement and implementation mechanism is carried out to note the challenges and successes of the Act in dealing with defilement incidences in Kenya and make recommendations on the way forward.

## 1.7 Theoretical framework

This study is informed by two theoretical approaches to crime prevention as they relate to this research.

### 1.7.1 The Radical Feminists Theory on Crime

Feminists believe that the society and necessarily the legal order is patriarchal.<sup>23</sup> This creates unequal power relations between men, women and children in society thereby making the latter two to be discriminated against. These unequal power relations are not just in terms of economic or political sphere but equally in the sexual sphere. Women are socialised to believe that men should be in control even of their sexuality. According to Finkelhor and Russell, women are not expected to initiate sexual relations. Men on the other hand are expected to not only take the initiative but also to overcome resistance and even consider resistance as a cover for sexual desire.<sup>24</sup>

Radical feminists focus on women as a class that is dominated by men and according to Catherine MacKinnon; the most important difference between men and women is the difference in power in that men dominate women.<sup>25</sup> It is her view that feminists should concentrate on identifying dominance so that gender equality issues are clearly identified as issues of distribution of power which will then challenge male supremacy and female subordination.

Feminists believe that in patriarchal cultures, sexuality is defined in terms of what is desirable in male-female sexual interaction as "...that the male will be persistent and aggressive, the female often reluctant and passive; that the male is invulnerable, powerful, hard and commanding, and that women desire such behaviour from men; that "real men" are able to get sexual access to women when, where, and how they want it; that sexual intercourse is an act of male conquest; that women are men's sexual objects or possessions; and that men "need" and are entitled to sex".<sup>26</sup>

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<sup>23</sup> M.D.A Freeman, "Feminist Jurisprudence" in *Lloyds Introduction to Jurisprudence*, London: Sweet and Maxwell (2008), p. 1287.

<sup>24</sup> D. Finkelhor. & Russel, D.E.H., *Women as perpetrators: Review of evidence*. In D. Finkelhor (Ed.), *Child sexual abuse: New theory and research* (1984) P. 182.

<sup>25</sup> Note 22, p. 1314.

<sup>26</sup> Rebecca Whisnant, "Feminist Perspectives on Rape", *The Stanford Encyclopaedia of Philosophy* (Spring 2011 Edition), Edward N. Zalta (ed.) available at <<http://plato.stanford.edu/archives/spr2011/entries/feminism-rape/>>. last accessed 13/11/13.

This perception explains why in many defilement incidences, the defilers will have a sense of justification for their acts. The offenders feel entitled to sexually abuse females since the society has inculcated in them that it is right to behave that way. Where a victim does not yield to their demands, they will use force and violence to conquer irrespective of the harm occasioned to the victim.

This theory is important to this research as radical feminists are committed to using the law to ensure that defilement cases are taken seriously so that the harm the victims suffer is recognized, and the perpetrators are held accountable.<sup>27</sup> This can only be achieved if the laws protecting children from defilement are rigorously implemented and enforced to avail the victims an opportunity to be heard and to get real justice.

### **1.7.2 The Rational Choice Theory of Crime**

In rational choice theories, individuals are seen as motivated by the wants or goals that express their 'preferences'. They act within specific constraints and on the basis of the information that they have about the conditions under which they are acting.<sup>28</sup> Bentham in consideration the driving force of human action concluded that,

“Nature has placed mankind under the governance of two sovereign masters, pain and pleasure”.<sup>29</sup>

This is the principle of utility which shows that human beings will primarily decide on whether to obey or break the law depending on the fear of the consequences that arise out of non compliance. Where the chances of facing a long jail term are real then, the expectation is that the person would reconsider before breaking the law.

Homans argued that human behaviour, like all animal behaviour, is not free but determined. It is shaped by the rewards and punishments that are encountered. People do those things that lead to rewards and they avoid whatever they are punished for. Reinforcement through rewards and punishments, technically termed 'conditioning', is the determining factor in human behaviour.<sup>30</sup>

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<sup>27</sup> Supra, note 23.

<sup>28</sup> Homans, G., *Social Behaviour: Its Elementary Forms*, London: Routledge and Kegan Paul (1961) cited in John Scott, *Rational Choice theory, From Understanding Contemporary Society: Theories of The Present*, edited by G. Browning, A. Halcli, and F. Webster. (, 2000)P. 3 available at <http://www.soc.iastate.edu/Sapp/soc401rationalchoice.pdf> last accessed 13/8/12.

<sup>29</sup> J. Bentham, *An Introduction to the Principles of Morals and Legislation*, (ed) J.H.Burns and H.L.A Hart, London: Methuen, 1982, p.1.

<sup>30</sup> Ibid.

This theory focuses on the individuals committing the offence and decisions made before committing the crime. It posits that offending behaviour is purposive and the individual offender hopes to gain in the offence. Offenders have goals when they commit offences even though these goals may be short lived or account for only a few benefits of the offence and take into account just a few of the risks concerned.

Defilers have their immediate goal as sexual gratification irrespective of the age of the person with whom the need is met. This gives defilers an opportunity to calculate the risk factor of the child overcoming their approach as close to zero which then reduces their risk of being caught. Their perceived minimization of being apprehended is heightened by their manipulation of the victim by threats and hence rarely do they attach much weight to the likely jail term in case of being arrested.

This theory is relevant to this research as the primary approach to the Kenyan law in preventing defilement has been through enactment of deterrent laws and minimizing the discretion of the judicial officers in sentencing. The law however can only achieve its deterrence if it is properly implemented and enforced so as to afford a potential offender no chances of escaping without meeting the punishment outlined. Where the potential offender is assured that their chances of getting quick, effective and timely justice is real, then there would be a significant reduction in crime rate.

According to Finkelhor<sup>31</sup>, justice systems approach to sexual abuse may have primary prevention effects, as the fear of swift, certain and serious punishment by the justice system will deter the abuse even before it occurs. It is thus important to look at whether the implementation of the law facilitates or decreases the risk to potential offenders in terms of whether there is a real likelihood of being caught and punished in a timely manner.

## **1.8 Literature Review**

David Finkelhor in his article, “Current information on the scope and nature of child abuse”<sup>32</sup> states that there has been increased revolution in the past twenty years on public and

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<sup>31</sup> David Finkelhor, “The Prevention of Childhood Sexual Abuse”, in *The Future of Children*, VOL. 19 / NO. 2 / FALL 2009 p. 171, available at [http://futureofchildren.org/futureofchildren/publications/docs/19\\_02\\_08.pdf](http://futureofchildren.org/futureofchildren/publications/docs/19_02_08.pdf) last accessed 26/8/13.

<sup>32</sup> David Finkelhor, “Current Information on the Scope and Nature of Child Sexual Abuse”, *The Future of Children* 4 (1994). P.49 [http://futureofchildren.org/futureofchildren/publications/docs/04\\_02\\_Full\\_Journal.pdf](http://futureofchildren.org/futureofchildren/publications/docs/04_02_Full_Journal.pdf) last accessed 13/11/13.

professional knowledge about child sexual abuse. He however states that most of the prevailing beliefs of the people about child sexual abuse have turned out to be wrong or oversimplified. He proposes that new myths or an oversimplification of issues has replaced the old. This means that more research needs to be carried out to find out what communities believe or are assimilating in terms of defilement and how this can be addressed to facilitate better handling of defilement incidences when they occur.

Jon Conte in his article, "Child Sexual Abuse: Awareness and Backlash"<sup>33</sup> believes that child sexual abuse issues stir up strong emotions, denial, minimization and rationalizations have always played a central role in the societal response to the subject. This according to him stems from the fact that when society fails to protect its children from sexual abuse, it looks for excuses as to why it failed. It is thus important to interrogate why despite there being laws to protect children from defilement, the incidences are on the rise. The role of the society and those who enforce and implement these laws and their attitude requires scrutiny to find the weak points in protecting children from defilement incidences.

Eastwood Christine et al in their article "*Attrition in Child Sexual Assault Cases: Why Lord Chief Justice Hale Got It Wrong*"<sup>34</sup> find that most reforms have not delivered to children the belief, protection or justice to which they are entitled; so much so that, in recent years, there has emerged in the literature a growing awareness and articulation that substantive legislative and procedural reform are not enough. They propose that more research needs to be carried out to understand the systemic and social factors that contribute to attrition in child sexual assault cases.

Oguli-Oumo<sup>35</sup> has noted that there is a general lack of an integrated approach in governments, with regard to strategies in dealing with gender based violence. According to Oguli-Oumo, this

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<sup>33</sup>Jon R. Conte, "Child Sexual Abuse: Awareness and Backlash", in *The Future of Children* 4 (1994) page 227, available at [http://futureofchildren.org/futureofchildren/publications/docs/04\\_02\\_Full\\_Journal.pdf](http://futureofchildren.org/futureofchildren/publications/docs/04_02_Full_Journal.pdf) last accessed 13/11/13.

<sup>34</sup>Christine Eastwood, Kift, Sally and Grace Rachel (2006) "Attrition in Child Sexual Assault Cases: Why Lord Chief Justice Hale Got It Wrong". *Journal of Judicial Administration* 16(2):pp. 81-91. available at <http://eprints.qut.edu.au> last accessed 14/12/2012.

<sup>35</sup> Margaret Oguli-Oumo, Et Al, *Promoting an Integrated Approach to Combat Gender-Based Violence: A Training Manual*, London Commonwealth Secretariat (2002) available at <http://www.accord.org.za/publications/book-reviews/604-promoting-an-integrated-approach-to-combat-gender-based-violence-a-training-manual> last accessed on 12/1/12.

approach improves coordination and collaboration among different stakeholders.<sup>36</sup> This would ensure that there are no haphazard activities aimed at achieving the same results.

Minayo<sup>37</sup> considers how the Sexual Offences Act has enhanced access to justice for the victims of gender based violence in Nairobi. She considers the fact that under the Act, victims can be both male and female and as such this eases access to justice and aftercare services for victims. It is therefore necessary that a study considers why the society has not responded to the law. Minayo's study looked at Nairobi region but it is important that a wider approach that looks at the national picture is considered so that the perspective can be widened.

Mbuthia<sup>38</sup> recognises that the community is the site for the denial of women's rights, brutality, violence and discrimination against women. She therefore proposes that the State should address violence and sexual assault at the community level to eradicate this vice. How the society views the offence of defilement requires scrutiny as a good law that has not been accepted by the society will be frustrated in its attempt at protecting children. Once the outlook of the society is considered, this will guide any training interventions as the prevention of defilement incidences must be balanced with the intervention processes after the event.

Seth L. Goldstein in his article "*Comment on Cross, Fine, Jones, and Walsh: We Are Now on the Same Page*"<sup>39</sup>, states that role conflict is a constant and ever-present issue in the intervention in child abuse in general and in sexual abuse (defilement) more particularly. He proposes that each and every individual who assists in the development of evidence towards a prosecutorial goal must understand their role. They must know the limits of that role as well as the rules of the road they must follow. It is therefore critical that the agencies involved in implementation and enforcement of the SOA understand the need for collaboration and linkages to better understand how they interact in the chain of justice to reduce defilement incidences.

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<sup>36</sup> Ibid.

<sup>37</sup> Minayo Lucy Lugalia, *The Sexual Offences Act 2006 and its role in enhancing access to justice for survivors of sexual violence in Nairobi*, MA. Project, Institute of Advanced Studies (IAS), 2011.

<sup>38</sup> Mbuthia A. N., *Societal Perceptions of Sexual Violence: The Case of Westlands Division, Nairobi*, M.A. Project, Institute of Advanced Studies (IAS), Nov 2007.

<sup>39</sup> Seth L. Goldstein (2012): Comment on Cross, Fine, Jones, and Walsh : We Are Now on the Same Page, *Journal of Child Sexual Abuse*, 21:2, 240-243, 2012 available at <http://dx.doi.org/10.1080/10538712.2012.661696> last accessed 14/12/2012.



The Centre for Disease Prevention and Control<sup>40</sup> envisages three modes of preventing sexual violence. These are primary, secondary and tertiary. Primary involves strategies before any kind of victimization has occurred. Secondary strategies come in after the offence has been committed to deal with the short term effects of the disease. Tertiary strategies are long term in nature and involve addressing the harm caused to the victim and how to rehabilitate. It is imperative that the Kenyan strategy is relooked to better integrate all the three models proposed so that the people are better equipped to understand how to avoid victimisation as well as where to find help in the event that one is victimised.

The report titled “*Sexual Violence: Setting the Research Agenda for Kenya*”<sup>41</sup> noted that there was inadequate data on research into the area of sexual violence and identified, developed, and prioritized areas for research on sexual violence in Kenya.<sup>42</sup> Amongst the priority areas recommended for further research was the impact of the Sexual Offences Act implementation on justice. It has been more than four years since the need to appraise the effectiveness of the SOA was highlighted and it is urgent that such an appraisal is carried out to take stock of the successes and shortcomings of the act and how best to mitigate the same.

Kamangu in her paper, “Patriarchy and the Law in Kenya: the Changing Paradigms”<sup>43</sup> considers the role of patriarchy in Kenyan laws in relation to criminal and personal law. She concludes that the legal developments taking place in Kenya were a challenge to patriarchy upon which the Kenyan society is founded. She proposed that customary law ideologies upon which patriarchy thrives must be identified and addressed.

This study picks up from where Kamangu left as it looks at the SOA which criminalises some of the practices such as defilement and early marriages. It is important to consider the way the society reacts to the SOA which questions some of the practices which have been unchallenged despite widespread knowledge of the harm they inflict on children. This research is timely as Kamangu’s paper was written before the SOA had been passed.

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<sup>40</sup>Center for Disease Prevention and Control (CDC),*Sexual Violence Prevention: Beginning the Dialogue*, 2004) available at < <http://www.cdc.gov/violenceprevention/pdf/svprevention-a.pdf>>last accessed 14/12/12

<sup>41</sup>Catherine Maternowska, Jill Keesbury& Nduku Kilonzo, *Sexual Violence: Setting the Research Agenda for Kenya* (2009), page 20, available at [http://www.popcouncil.org/pdfs/2009RH\\_SGBVKenya.pdf](http://www.popcouncil.org/pdfs/2009RH_SGBVKenya.pdf) last accessed 21/8/13.

<sup>42</sup>Ibid p. 10.

<sup>43</sup> Nellie Kamangu ,”Patriarchy and the Law In Kenya: The Changing Paradigms”, University of Nairobi LLM Thesis 2005, p. 100

Awuor Linda, in her paper, “Loss of Innocence: A Plea against the Defilement of Minors in Kenya”<sup>44</sup> considered the rising cases of defilement then and questioned whether the law was too lenient on child sex offenders. She concluded that it was the implementation of the law that was the problem. This paper was done when the SOA was just one year old and there was a lot of confusion in its implementation as there were no guidelines to the law enforcement agencies. It is important to interrogate whether seven years later, the situation has changed as guidelines and the Task Force have been put in place to facilitate implementation of the Act.

Kiwool Irene, in her work, “The Sexual Offences Act 2006: A Case for Review”<sup>45</sup> reviewed the sexual offences act then and the perceived gaps that were viewed as difficult in the implementation of the Act. She also considered the contentious section 38 of the Act which provided a sentence similar to the offence where the complainant had complained and was unable to prove their allegations.

She also rightfully noted that the Attorney General’s office had not put in place a clear strategy to operationalise the Act to include a monitoring and compliance body. It is noteworthy that her study was in 2007 when the Task Force was at its infancy and as stated earlier there was a lot of confusion in translating from the penal code to the Sexual Offences Act. It is thus important to consider the role that the Task Force has played since the same was set up to consider whether the situation as noted by Kiwool has improved.

The literature reviewed established that a look at the implementation and enforcement of the SOA is urgent because since 2006 when the Act was passed, no comprehensive appraisal of the Law and the agencies tasked with enforcement and implementation of the same has been done. Further, available material on the subject of sexual offences has concentrated on the law and causes of sexual offences. The effectiveness of the implementers and enforcers of the Act has been largely overshadowed hence creating a knowledge gap making this research timely.

## **1.9 Research methodology**

This was a desk / library based research. Reference was made to primary and secondary data. Primary data reviewed included reports on sexual offences from NGO’s, policy documents,

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<sup>44</sup> Awuor Linda, “Loss of Innocence: A Plea against the Defilement of Minors in Kenya” University of Nairobi, LLB Dissertation, June 2007.

<sup>45</sup> Irene Kiwool, “The Sexual Offences Act 2006: A Case for Review”, University of Nairobi LLB Dissertation, August 2007.

conventions, treaties and statutes, government papers and case law on sexual offences. Secondary data included books, journal articles, internet sources and reports of treaty monitoring bodies.

### **1.10 Chapter break down**

The research findings will be presented in four chapters. Chapter One will be the introduction. It contains a background into the issue of defilement in Kenya and justification for the current study. It also contains the statement of the problem, the objectives, hypothesis, theoretical framework and literature review. Chapter Two entails a critical analysis of the law on defilement in Kenya. Chapter Three discusses the institutions mandated with the enforcement and implementation of the law on defilement in Kenya. This also entails a critical look into any factors affecting the effective enforcement of the law on defilement. Chapter Four makes recommendations on how to deal with the limiting factors and enhance effective enforcement and implementation of the law on defilement.

## CHAPTER TWO

### INTERNATIONAL, REGIONAL AND NATIONAL LAWS ON DEFILEMENT

#### 2.0 Introduction

Defilement is defined as the partial or complete insertion of the genital organs of a person into the genital organs of a person below eighteen years of age.<sup>46</sup> The law protects people who are below 18 years as they are deemed immature and unable to appreciate the nature of sexual relations. Defilement therefore negates consent of the child as they may not understand what they are getting into. This chapter critically look on the law on defilement. This will be considered in light of the international, regional and national legal framework on defilement.

#### 2.1 The International Legal Framework on Defilement

##### 2.1.1 The Universal Declaration of Human Rights (UDHR)

The Universal Declaration of Human Rights<sup>47</sup> confers inalienable rights to all persons irrespective of their age. Further, Article 2 of The UDHR provides that everyone is entitled to all the rights and freedoms therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The UDHR recognizes the inherent dignity of a human being and requires that “no person shall be subjected to arbitrary interference with his privacy... or attacks upon their honour. Every person is entitled to the protection of the law against such interference or attacks.”<sup>48</sup> UDHR is obligated to take measures to ensure the full enjoyment of these rights by all citizenry including children. Though the UDHR is a declaration, its wide usage and application has informed State practice and *opinion juris* giving it the status of international customary law applicable to all States.

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<sup>46</sup> Section 2 of the Sexual Offences Act.

<sup>47</sup> Available at < <http://www.un.org/en/documents/udhr/index.shtml>>, last accessed on 3/6/13.

<sup>48</sup> Article 12 of the Universal Declaration of Human Rights.

### 2.1.2 The International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights (ICCPR)<sup>49</sup> recognizes the inherent dignity of the human person. The ICCPR requires state parties to take measures to ensure that no human person is subjected to arbitrary or unlawful interference with their privacy ... or unlawful attacks on their honour.<sup>50</sup> Any such interference should be adequately addressed by passing laws to uphold the rights of the victims by punishing any violators.

It cannot be gainsaid that defilement of children is indeed an attack on the dignity and honour of a child and equally a violation to their right to privacy and should be prosecutable before any court. The convention has an enforcement mechanism comprising the **Human Rights Committee** (HRC) which monitors the implementation of the International Covenant on Civil and Political Rights. It is composed of 18 independent experts of recognized competence in the field of human rights. The Committee was established when the Covenant entered into force in 1976. The First Optional Protocol to the International Covenant on Civil and Political Rights<sup>51</sup>, which entered into force together with the Covenant, authorizes the Committee to also consider allegations from individuals concerning alleged violations of their civil and political rights subject to their having exhausted all available domestic remedies by submitting written communications to it.<sup>52</sup>

Apart from the country reports that member states have an obligation to file with the committee to show progress made in implementing the rights enshrined in the covenant, civil society groups and nongovernmental organisations(NGOs) can file shadow reports and expose any issues of human rights violations against individuals which have been unaddressed by the state mechanisms. This would require the state to answer to the allegations and be guided on how best to address the violations including but not limited to technical support.

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<sup>49</sup> Adopted by the General Assembly of the United Nations on 19<sup>th</sup> December 1966 and came into force on 23<sup>rd</sup> May 1976, available at <<http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>> last accessed on 10/6/13.

<sup>50</sup> Article 17 of the International Covenant on Civil and Political Rights.

<sup>51</sup> Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976, available at <http://www1.umn.edu/humanrts/instree/b4ccprp1.htm> last accessed 21/8/13.

<sup>52</sup> Article 2.

### **2.1.3 The Convention on the Rights of the Child (CRC)**

The Convention on the Rights of the Child<sup>53</sup> recognizes that the child is a subject of fundamental rights and liberties and as such recognizes the child as a personality with his or her own dignity and individuality. Consequently, the convention in its body proclaims that no child shall be subjected to arbitrary or unlawful interference with his or her privacy or to attacks on his or her honour and reputation.<sup>54</sup> The Convention requires state parties to protect the child from such interference or attacks.

The Convention on the Rights of the Child<sup>55</sup> requires state parties to take action to protect the child from all forms of sexual exploitation and sexual abuse. Specifically, states are obliged to take measures to prevent inducement or coercion of a child to engage in any sexual activity. Further, there should not be any exploitative use of children in prostitution and pornography amongst other unlawful sexual practices.<sup>56</sup>

The Convention specifically recognizes the fact that a child is a person aged below 18 years and sets the age for state parties to harmonise their legal recognition of who a child is.<sup>57</sup> Kenya, as a signatory to the Convention on the Rights of the Child, must take measures to ensure maximum protection of children.

The convention has an implementation mechanism that requires state parties to submit periodic reports to a committee of experts detailing the measures taken to implement the Convention. The success of the committee therefore depends on the willingness of the national governments to take its criticisms and recommendations since its decisions are advisory and non adversarial. The mechanism relies on diplomacy rather than legal sanctions.

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<sup>53</sup> Adopted and opened for signature , ratification and accession by General Assembly Resolution 44/25 of 20<sup>th</sup> November 1989 and entered into force on 2<sup>nd</sup> September 1990 available at <<http://www.ohchr.org/EN/professionalinterest/pages/CRC.aspx>> last accessed on 3/6/13.

<sup>54</sup> Supra, note 51.

<sup>55</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20<sup>th</sup> November 1989 and entered into force on 2<sup>nd</sup> September 1990, available at <<http://www.ohchr.org/EN/professionalinterest/pages/CRC.aspx>>last accessed on 3/6/13.

<sup>56</sup> Convention on the Rights of the Child.

<sup>57</sup> Ibid article 1.

According to Ursula Kiikelly,<sup>58</sup> a limitation of the convention lies in its lack of a powerful system of enforcement and especially a system that would adjudicate on individual petitions or complaints filed on behalf of the child victims. This would allow for the principles of the convention to be invoked where necessary in order to offer guidance on the interpretation and application of the convention.

#### **2.1.4 Convention on Elimination of all Forms of Discrimination against Women**

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>59</sup> in its preamble acknowledges that extensive discrimination against women continues to exist and in essence such discrimination violates the principles of equality of rights and respect for human dignity. Discrimination is defined as "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."<sup>60</sup>

The Convention requires States parties to take "all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men".<sup>61</sup>

Kenya, being a signatory to the Convention, has an obligation to take all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.<sup>62</sup>

In enforcing laws on defilement, any inaction by enforcement agencies on defilement complaints could be discerned as amounting to discrimination. The attitudes and cultural orientation of enforcement officers often hinder action on such complaints leading to a failure of justice and consequently, discrimination of a vulnerable segment of society.

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<sup>58</sup> Ursula Kiikelly, "The Best of Both Worlds for Children's Rights and Interpretation of the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child", *Human Rights Quarterly* (2001) in Sara Dillon, *International Children's Rights*, 2010, Carolina Academic Press, p. 861-865.

<sup>59</sup> The Convention was adopted in 1979 by the United Nations General Assembly and Kenya ratified it on the 9<sup>th</sup> March 1984.

<sup>60</sup> Article 1 of the Convention on Elimination of all Forms of Discrimination against Women.

<sup>61</sup> Ibid Article 3.

<sup>62</sup> Ibid Article 3.

## **2.2 The Regional Legal Framework on Defilement**

### **2.2.1 The African Charter on Human and People's Rights**

The African Charter on The Human and People's Rights (the Banjul Charter)<sup>63</sup> recognizes that human beings are inviolable and hence entitled to respect for their life and integrity of their person.<sup>64</sup> It is therefore a violation of the rights articulated in the Charter when anybody defiles a child and as such they should be brought to account for their violations. Further, the Charter recognizes the right to the dignity inherent in a human being and prohibits all forms of exploitation and degradation.<sup>65</sup> The African Charter therefore has the framework for the prevention of degrading treatment on people especially defilement on children.

### **2.2.2 The African Charter on the Rights and Welfare of the Child**

The African Charter on the Rights and Welfare of the Child<sup>66</sup> defines a child as any human person below 18 years.<sup>67</sup> It thus sets the pace for the legal age of a child. The Charter recognizes the right of every child to protection of their privacy and requires that no child should be subject to unlawful interference with their privacy and attacks on their honour.<sup>68</sup> Acts of defilement are an affront to the privacy and honour of a child and state parties are obligated to take measures to ensure that the children's rights in this aspect are not violated.

The Charter further protects children from sexual abuse<sup>69</sup> and all forms of sexual exploitation and sexual abuse including inducement, coercion or encouragement of children to engage in any sexual activity. The use of children in prostitution or other sexual activities and in pornography is prohibited.<sup>70</sup> The Charter therefore has an adequate framework for the protection of the child from defilement and other harmful sexual practices.

The Charter has an eleven member African committee of experts on the rights and welfare of the child (African Child Rights Committee). The Committee receives periodic reports from state parties on implementing measures they have taken within two years of becoming state parties

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<sup>63</sup> This Charter entered into force on 21<sup>st</sup> October 1986.

<sup>64</sup> African Charter on Peoples and Human Rights article 4.

<sup>65</sup> Supra article 5.

<sup>66</sup> OAU Doc.CAB/LEG/24.9/49 (1990). The Charter entered into force in November 29 1999 available at <http://acerwc.org/acerwc-Charter-full-text/> last accessed 3/6/13.

<sup>67</sup> Ibid Article 2.

<sup>68</sup> Ibid article 10.

<sup>69</sup> African Charter on the Rights and Welfare of the Child Article 16.

<sup>70</sup> Ibid article 27.



and every three years thereafter.<sup>71</sup> Under article 44 of the Charter, the committee is mandated to receive communications from any person, group or non-governmental organization recognized by the organization of African unity, by a member state or the United Nations relating to any matter covered by the Charter.

## **2.3 The National Framework on Defilement**

### **2.3.1 The Constitution of Kenya**

The Constitution of Kenya 2010 in its preamble is committed to nurturing and protecting the well being of the individual. The Constitution further recognizes human dignity and respect for human rights as a valuable national mandate that must be embraced by all for people to live in harmony.<sup>72</sup>

In terms of the bill of rights, the Constitution upholds the dignity of individuals and exhorts all to recognize and protect human rights, to uphold this dignity and promote social justice.<sup>73</sup> The Constitution further provides that every person has inherent dignity and the right to have that dignity respected and protected.<sup>74</sup> This means that without the people and state organs respecting the value of people, we would have anarchy where people would do as they wish without caring the effect of their actions on others especially the vulnerable children.

The Constitution imposes duties on every individual to respect the rights of others in society. The Constitution further allows a person to challenge any act or omission that has threatened or threatens to contravene their rights as enshrined in the Constitution.<sup>75</sup> The Constitution recognizes that every child has the right to be protected from abuse ... and all forms of violence, inhuman treatment and punishment.<sup>76</sup>

The Constitution recognizes the rights of children as paramount by further expounding on the rights in the chapter emphasizing on specific application of rights. Children's rights to protection from abuse, harmful cultural practices, all forms of violence (including physical and sexual violence), inhuman and degrading treatment require commitment and goodwill from both the

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<sup>71</sup> Ibid article 34.

<sup>72</sup> Article 10 of the Constitution of Kenya.

<sup>73</sup> Ibid article 19.

<sup>74</sup> Ibid article 28.

<sup>75</sup> Article 27.

<sup>76</sup> Article 53(1) (d) Constitution of Kenya.

society and state machinery. Defilement engages a child in abusive conduct and in most cases is undertaken through violence or threats of violence.

Whereas the Constitution provides and guarantees these rights to protect children and provides a remedial framework, there are many threats to the enjoyment of these rights by the children. According to a report by Shaheed, an Independent Expert in the field of cultural rights,

“There is a need to work simultaneously at the level of both society and state. The law itself reflects the dominant cultural beliefs of a society, evident in the text of the law such as the prohibitions or prescriptions and the severity of punishment prescribed for a particular act compared with greater leniency for another, as well as legal silences: acts which a society condones by silence”<sup>77</sup>

It is these acts of silence that the society condones that must be addressed in ensuring that harmful practices such as defilement do not deny children of their fundamental rights.

It is evident that culture in many instances undermines the effects of defilement on girls and despite the various rights enumerated in the Constitution, it would require a vigorous rights based approach towards sensitizing communities on the harmful effects of some of their culture at denying their girls their dignity and perpetuating defilement against them.

The Constitution<sup>78</sup> protects the rights of any vulnerable group of person and places a duty on all state organs and public officers to facilitate the realization of their rights. Children are listed as vulnerable due to their tender age. As such, any person who violates a child through defilement can be held accountable under the Constitution. The Constitution bestows the High Court with the power to enforce the rights of persons who claim or allege that their rights have been violated<sup>79</sup>. In the case of *Ripples International (suing as next friend of 8 minors) vs. the Inspector General of Police and Others*<sup>80</sup>, the High Court in Meru has set a precedent by holding the police accountable for neglecting to take action in various defilement complaints that had been reported to them for investigations. The Court has issued mandamus orders directing the

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<sup>77</sup>Farida Shaheed, “Cultures, Traditions And Violence Against Women: Human Rights Challenges”, A Paper presented at the panel discussion at the UN Human Rights Council, Geneva, Switzerland, March 7 2011, available at <<http://www.awid.org/Library/Cultures-Traditions-and-Violence-Against-Women-Human-Rights-Challenges>>last accessed on 21/8/13.

<sup>78</sup> Article 21(3), Constitution 2010.

<sup>79</sup> Article 23, Constitution 2010.

<sup>80</sup> [2013] eKLR.

police to investigate and report to the Court on the progress made in addressing the violations on the children.

The case was filed by Ripples International, a Non Governmental Organisation on behalf of eleven victims of defilement and other forms of sexual violations. The victims had made reports at various police stations within Meru County detailing their complaints. The petitioners alleged that despite reporting to the police to take action, none of the complaints had been investigated and no charges had been filed in court in respect to the said complaints. It was further alleged that the police had demanded for payment from the victims before they could attend to them to facilitate fuel and payment for the P3 forms. The petitioners therefore sought declarations to the effect that the omission, neglect, refusal and failure by the police to conduct prompt, proper and professional investigations into their complaints, violated their fundamental rights under the constitution of Kenya, the Universal Declaration of Human Rights, the Convention on the Rights of the Child, the African Charter on Human and Peoples Rights and the African Charter on the Rights and Welfare of the Child.

The court was tasked to determine whether the alleged shoddy investigations by the investigating officers amounted to infringement of the petitioners rights to special protection as vulnerable members of society, right to human dignity, right to access to justice, right to protection from abuse, neglect and protection from all forms of violence and right to protection from inhuman treatment amongst other rights.

The court upon consideration of material placed before it was satisfied that the Respondents' had violated the rights to the petitioners by neglecting, omitting, refusing and failing to conduct prompt, effective, and professional investigations. The Court further issued mandamus orders directing the police to conduct investigations into the petitioners' complaints and further adhere to their professionalism as stipulated under the constitution by ensuring respect of people's rights and their dignity. The court further found that by demanding for money for whatever facilitation from the minors, the police had violated the petitioners right to access to justice as stipulated by the Constitution.

This case is a precedent in that it is the first time the investigative agency has been sued in court for their failure and inefficiency in implementing the law in relation to the enforcement of the Sexual Offences Act and specifically defilement as all the petitioners were minors. It starts the

long road to making people accountable for how they exercise the powers they hold in trust for the public especially in relation to enhancing dignity of the person and giving proper meaning to fundamental rights as enshrined in the Constitution and various international and regional instruments.

Further, the Court upheld the provisions of the International Conventions and treaties that the government has entered into with regard to upholding fundamental rights. This confirms that the government can be taken to task over its obligations to the international community if its internal processes are not working and be held accountable for the omissions of its agencies and officers.

Article 2 of the Constitution provides that any Treaties or Conventions ratified by the country shall form part of the law of Kenya. This is in addition to the general rules of international law. This means that they form part of Kenyan municipal law once they have been domesticated. Of importance to the subject of human rights is the fact that the constitution has provided for an independent commission to investigate into the compliance with human rights both nationally and under international obligations.<sup>81</sup> The Kenya National Human Rights Commission (KNHRC) is empowered to ensure compliance with human rights. It has capacity to carry out its own investigations and receive individual complaints on alleged violation of human rights. The rights in the Constitution in relation to protection of children from defilement are enforced through various laws as stated hereunder.

### **2.3.2 The Sexual Offences Act**

The Sexual Offences Act (hereinafter referred to as the SOA) is an Act of parliament that was passed on the 4<sup>th</sup> July, 2006 and became operational on 21<sup>st</sup> July 2006. The Act defines sexual offences and provides for ways to prevent and protect all people from harm from unlawful sexual acts.

The SOA's legislative history was guided by the outcry in the society over impunity with which sexual offences before 2006 were being handled by the enforcement mechanism. There were minimal successful prosecutions due to hindrances in the evidence tendering processes. In an effort to stem the rise in the sexual offences, the motion for the sexual offences bill was

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<sup>81</sup> Article 59 of the Constitution.

introduced by Hon Njoki Ndung'u<sup>82</sup>. Though the bill sought to deal with a serious national problem then, it faced stiff opposition from a majority of the male members of parliament due to various reasons.

Key among the reasons for opposition were ignorance of the law, cultural and social attitudes about male ownership of women's bodies while others saw it as a threat to the status quo where men use sex to control.<sup>83</sup> It is precisely these undertones that overwhelmed parliamentary debates that must critically be examined to see whether as they undermined the passage of the bill then, they still undermine the implementation of the Act making it less effective in its intended purpose.

The SOA defines a child as any person below 18 years of age. This is consistent with the Convention of the Rights of the Child which defines a child as such. The Act in its bid to protect children has also deemed victims as vulnerable and thus requires the court to handle the victims with sensitivity to facilitate access to justice. The Act further provides for the offence of attempted defilement and provides for a minimum sentence of 10 years.<sup>84</sup>

### **2.3.2.1 Offences Recognized in the Act**

#### **2.3.2.2 Defilement and Attempted Defilement**

The SOA prohibits defilement and defines it as any act that causes penetration with a child.<sup>85</sup> Penetration is the partial or complete insertion of the genital organs of a person into the genital organs of another person.<sup>86</sup> Any person who penetrates the genitals of a child with or without their consent commits the offence of defilement and thus violates the child's rights to inherent dignity and their right to protection from degrading treatment.

The SOA graduates the offence depending on the age of the complainant. The sentence for any defilement where the victim is aged below 11 years is a minimum sentence of life

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<sup>82</sup> Then a nominated Member of Parliament. Currently a Judge of the Supreme Court of Kenya, the highest court in the land.

<sup>83</sup> Hon. Njoki Ndung'u, "Preventing and Responding to Violence Against Girls, From Legislation to Effective Law Enforcement: The Kenyan Experience," A Paper presented at the Regional Seminar for Asian Parliaments, New Delhi, 15-17 September 2011, p. 3 available at <[www.ipu.org/splz-e/newdelhi11/ndungu.pdf](http://www.ipu.org/splz-e/newdelhi11/ndungu.pdf)> last accessed on 21/8/13.

<sup>84</sup> Section 9 SOA.

<sup>85</sup> Section 8 SOA.

<sup>86</sup> Section 2 SOA.

imprisonment.<sup>87</sup> Where the complainant is aged between 12 and 15 years, the offence attracts a minimum sentence of 20 years while for victims aged between 16 and 18 years, the offence has a minimum sentence of 15 years.<sup>88</sup>

Attempted defilement occurs where the offender is unsuccessful at completing the offence. The offence carries a mandatory minimum sentence of 10 years.<sup>89</sup>

For offenders who commit the offence of defilement in association with another or others or are accompanied by another, the offence of gang rape caters for that situation and a minimum sentence of 15 years is provided. The sentence can be enhanced to life imprisonment.<sup>90</sup>

### **2.3.2.3 Incest**

The SOA also protects children from defilement by relatives. The offence of incest prohibits indecent acts or defilement of female children by relatives. The offence carries a life sentence.<sup>91</sup> The Act negates consent in the offence of incest. This is relevant since in a family setting, the child looks upon the family members for guidance and when asked to do certain acts by an older person, the child would do so without questioning due to the trust on the family member. Attempts to commit incest are equally prohibited and attract a minimum sentence of 10 years.<sup>92</sup>

In testing whether an offence of incest has been committed, the relationship extends to half brothers and sisters and adopted brothers and sisters.<sup>93</sup> This is important as adopted children and half brothers and sisters have been defiled by the adoptive parents on the understanding that they are not blood children. The SOA, in bringing them within the meaning of family member, has defeated any attempts to treat them outside the family circle for purposes of committing defilement upon them.

The SOA, in further endeavouring to protect children defiled in a family by relatives, has provided for removal orders of any accused person who is living with a victim until the matter is concluded. The court has the power to declare such a victim as a child in need of care and protection and make protective orders under the Children Act.<sup>94</sup>

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<sup>87</sup> Section 8(3).

<sup>88</sup> Section 8(4).

<sup>89</sup> Section 9(2) .SOA

<sup>90</sup> Ibid section 10.

<sup>91</sup> Ibid section 20.

<sup>92</sup> Section 20(2) SOA.

<sup>93</sup> Ibid Section 22(2).

<sup>94</sup> Ibid Section 22(4).

This is relevant as it has happened in instances where the defiler is a father or uncle taking care of the child and the child is dependent on the accused. In incidents where the accused is released on bond, some threaten the complainants with dire consequences especially on provision of basic needs in order to silence them from testifying against them.

The Act mandates every convicted defiler to disclose such a conviction when applying for a job which will place him or her in a position of authority or care of children.<sup>95</sup> This would apply to people like doctors, nurses, teachers, children officers amongst others. The aim of the disclosure is to ensure that they do not perpetuate their offensive conduct to unsuspecting children.

Whereas the SOA has comprehensive provisions against defilement of children, there are still some gaps that need to be addressed. The SOA consolidated all sexual offences. However, the offences of defilement of imbeciles and idiots were left in the Penal Code. This means the police are faced with a dilemma when filing charges for the offence.

The offence of incest carries a sentence of ten years which can be enhanced to life. Unlike defilement, it does not have a minimum mandatory sentence yet incest of minors is as damaging as defilement. There is need for the offence to have a mandatory minimum sentence especially when it involves minors. The ten year sentence should be the minimum sentence which can be enhanced to life where a minor is involved.

### **2.3.3 The Children Act**

The Children Act<sup>96</sup> provides the main law for the protection of children's rights. In terms of defilement, the Act defines a child as anybody below 18 years. This is important because different laws would define a child depending on the situation at hand. Some laws provided for marriage at age 16 years with the consent of parents. This would negate the application of the law on children. In terms of the legal definition of a child, there can be no excuse to apply a different standard while the Children Act has provided the guide.

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<sup>95</sup> Section 30 of the SOA.

<sup>96</sup> Act No. 8 of 2001.

The Act defines children who are defiled as children in need of care and protection.<sup>97</sup> This then brings such children within the jurisdiction of the Act for orders for protection. This protection extends to children exposed to pornography<sup>98</sup> and those exposed to obscene publications. The Act also provides for the victims of defilement to be availed legal aid to appreciate the proceedings undertaken on their behalf. The Children Act embodies the principle of the best interests of the child. This ensures that all circumstances demand that the child's interests are paramount and the welfare of the child is given priority in determining the issues of the child.

In the context of defilement, most cases of children which are determined in the traditional justice system do not consider the best interests of the child. The cases mainly consider the parents of the victim and the defiler and rarely consider the rights of the child. In other communities, the defilement of a child is considered a minor offence compared with the rape of a married woman. This is because they consider the sustenance of family institutions as paramount as compared with that of a girl who can be married of any time.<sup>99</sup> For a woman, they consider it threatens the already established family system.

The Children Act has extensive provisions for the protection of children. However, most of these sections are usually invoked in civil proceedings. Rarely have the provisions of the Act been used to cushion children who are defiled by availing them the protection envisaged by the Act. There is need for sensitization of the criminal justice players especially investigators and prosecutors on how best to use the Children Act to protect defiled children.

Though the Constitution, The SOA and the Children Act clearly define a child as anyone below 18 years of age, various marriage laws in Kenya define the age of marriage separately. This explains why there are different ages for marriage under the various marriage statutes in Kenya. Under the Marriage Act,<sup>100</sup> a child under eighteen years of age requires written consent to the intended marriage signed by the person having the lawful custody of any such a child. The Hindu Marriage and Divorce Act<sup>101</sup> provides that a marriage may be solemnized if the bridegroom has attained the age of eighteen years and the bride the age of sixteen years at the time of the marriage and where the bride has not attained the age of eighteen years, the consent

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<sup>97</sup> Children Act Section 119.

<sup>98</sup> Section 114 of the Children Act.

<sup>99</sup> Supra note 22.

<sup>100</sup> Section 19 of the Marriage Act Cap 150 Laws of Kenya.

<sup>101</sup> Cap 157 Laws of Kenya.



of her guardian in marriage, if any, should be obtained for the marriage.<sup>102</sup> While the African Christian Marriage and Divorce Act does not provide for a specific age of marriage, it envisages that a child attains majority age at 16 years.<sup>103</sup> The proposed Marriage Bill 2013 at section 4 in seeking to harmonize the age of marriage provides that a person shall not marry unless that person has attained the age of eighteen years. There is need for the marriage laws to tally with the Constitution in defining a child to avoid parents consenting to their children who have been defiled to be married off to the perpetrators. This also upholds cultural practices of early child marriages which perpetuate defilement against children.

## **2.4 Conclusion**

The analysis of the international, regional and national framework on defilement has demonstrated that there is a legal framework for the protection of children from defilement. The international instruments and the Constitution accord children rights and to this extent challenges patriarchy which does not afford children and women rights as they are subordinate to men. The national laws especially the SOA and the Children Act conform to the international instruments on protection of children from defilement. However the marriage laws in Kenya have separate ages for purposes of getting into a marital relationship. This perpetuates defilement of minors where they are married off to the accused persons to settle the matter out of court.

The Sexual Offences Act does not expressly provide for defilement against children with mental challenges leaving the police with the choice of charging perpetrators with the offence of defilement of imbeciles and idiots under the Penal Code. The very words used to refer to the victims, namely idiot and imbecile, are demeaning to the victims and need to be repealed from the Penal Code and included in the SOA with more humane definitions.

The offence of incest of a minor has no minimum sentence and this affords an opportunity for perpetrators to get lighter sentences than those who commit defilement. The twenty year sentence should be provided as a mandatory minimum which can be enhanced to life. This would remove sentencing discretion from the trial courts as was intended by the SOA and harmonise sentences in relation to the offence.

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<sup>102</sup> Section 3 of the Marriage and Divorce Act Cap 157 Laws of Kenya.

<sup>103</sup> Section 13(2) of the African Christian Marriage and Divorce Act Cap 151 Laws of Kenya.

The SOA has categorised various offences that are committed against children and provided sentences to deal with those found to have violated them. The reality on the ground, however, needs to be verified as it would be expected that with a good legal system in place, its enforcement and implementation would send a message that violations against children's dignity and honour cannot be accepted. This will be looked at in the next chapter as the reality on the enforcement of the various laws is critically analysed.

## CHAPTER THREE

### ENFORCING AND IMPLEMENTING AGENCIES OF THE LAW ON DEFILEMENT IN KENYA

#### 3.0 Introduction

This chapter analyses the policy framework for the implementation of the sexual offences, the implementation mechanism and the agencies tasked with the enforcement and implementation of the laws on defilement in Kenya. These agencies include the Kenya Police Service, the Office of the Director of Public Prosecutions, the Judiciary, and the Ministry of Health amongst others. The role of these agencies will be critically assessed to see where they have failed in enforcing the Sexual Offences Act and thus contributed to its lukewarm implementation.

#### 3.1 The Policy Framework and Implementation Mechanism

The Sexual Offences Act<sup>104</sup> requires a national policy to be put in place to guide in the implementation and administration of the Act. This will ensure uniform treatment of all sexual offences and specifically cater for management of victims of sexual offences.

The need for a policy framework became necessary to facilitate a coherent and comprehensive framework to guide the various sectors involved in administration and management of sexual offences.

The Task Force in 2011 facilitated the preparation of the national policy framework and guidelines for administration of sexual violence.<sup>105</sup> The policy provides for a platform of action for public officers with the task of administration of the Act.<sup>106</sup> The policy further presents circumstances that triggers and offers a broad based knowledge to promote prevention and curb increased levels of sexual offences in Kenya. The policy proposes the establishment of a coordinating body headed by a Director who will manage the secretariat and the sectors involved.

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<sup>104</sup> Section 46, SOA.

<sup>105</sup> State Law Office, National Policy and Guidelines on the Administration of the Sexual Offences Act, Nairobi, 2011.

<sup>106</sup> FIDA-Kenya, *Research report on the implementation of the Sexual Offences Act in the justice sector* available at [www.fida-kenya.org](http://www.fida-kenya.org) last accessed 12/8/13.

Another critical aspect provided for by the policy is the provision of monitoring and evaluation of the actors involved in the management of sexual offences. This will ensure that people are accountable for the roles assigned to them by the Act to facilitate effective implementation of the Act.

Various stakeholders have been given actionable areas to deal with. The State Law Office (SLO) falling under the Attorney General has been tasked to facilitate the establishment of the National Authority on the Administration of the Sexual Offences (NAASO)<sup>107</sup>. This Authority will comprise a chair assisted by board members. The Authority will be given legal and operational independence to enable it achieve its mandate.

Of equal importance is that the Attorney General has been tasked to review to address sexual offences between minors.<sup>108</sup> Teenagers graduating to adulthood have been severally caught up by the law when they engage in sexual practices amongst themselves. More often than not, the girl victim is spared while the boy is charged in court despite the accused and the victim being minors and having engaged in “consensual” sexual activity. It will be imperative that the law considers other alternative but appropriate ways to deal with such situations and specifically to differentiate them from adults who take advantage of minors.

With regard to the judiciary, the policy requires the courts to facilitate comprehensive training of all Judges and Magistrates on matters of sexual offences. This will address any biases and stereotypes that may hamper effective administration of the Act.

Further, the judiciary is required to implement the provisions of the Witness Protection Act<sup>109</sup> to cater for protection of vulnerable witnesses to ensure their security before and after they testify in court.

The probation department is required under the policy to conduct supervision and reintegration of sexual offenders into the society and also facilitate the maintenance of updated data base on sexual offenders supervision.

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<sup>107</sup> Note 102, p. 16.

<sup>108</sup> Republic of Kenya, National Policy and Guidelines on the Administration of the Sexual Offences Act, 2011.

<sup>109</sup> Cap 79 Laws of Kenya.

The provincial administration has been given the specific task of giving prominence to the Sexual Offences Act provisions in their meetings. This is a powerful agenda as the chiefs are closer to the people at the grassroots and he can play a powerful role of creating awareness and sensitising the people on the SOA provisions.

The health sector has been tasked to facilitate proper collection and chain of custody of evidence and to establish a one stop centre for victims of sexual offences to coordinate provision of their services. Of great importance is the requirement to introduce a police liaison officer at every health facility. This officer will be in constant touch with the investigating officers and will ensure the police and health workers have one purpose while handling victims which is to handle them humanely and collect available evidence to facilitate effective prosecution of cases.

The Ministry of Education's role of enlightening pupils and students on forms of sexual abuse and how to detect and avoid victimisation has been recognised. The ministry has been tasked to educate the society with a view to eliminating retrogressive cultural practices that underlie and breed sexual violence.

The NAASO will ensure that budgetary provision is made to cater for poor victims of sexual offences to enable them access facilitation to report cases and treatment needed. The Authority will also be responsible for the translation of the SOA into the main languages spoken in the country to enhance awareness. Further and very critical is the mandate to hold annual conferences with stakeholders on sexual offences. This will bring all stakeholders and international agencies involved in monitoring sexual violence trends to account and peer review on progress made and way forward. The Authority will also document statistics on sexual offences on a monthly basis to enable it follow up on how the offences have been managed along the various chains in the implementation and enforcement agencies.

The various provisions in the policy are forward looking and will facilitate direction and coordination through the proposed Authority to implement the provisions of the Act. It is however noted that despite the policy having been drafted and forwarded to the Attorney General in 2011, the same has not been approved. A decision by the Cabinet is pending so that the Attorney General can publish the policy and the guidelines to facilitate the rolling out of the planned actions. This is a major setback which needs to be fast tracked as the delay in approving

the same means that implementation of the SOA is still uncoordinated and will not produce the desired fruits.

The policy is also deficient in that the role of the Office of the Director of Public Prosecutions has been given minimal consideration. Noting that the office plays a key role in enforcement of the Act by prosecuting sexual offences before courts, the policy should adequately capture the prosecutorial function and task the Director of Public Prosecutions to enhance capacity of prosecutors available to prosecute the cases presented in court. The office should further ensure that its officers are adequately trained and sensitised to deal with sexual offences in court. Further to this, the office should avail counselling and debriefing services for prosecutors handling sexual offences in court to avoid burnout.

The policy and framework however require goodwill as the proposed action points require commitment and resources to implement. It is recommended that Cabinet should without further delay approve the policy to enable its publishing and dissemination. This is critical in light of the fact that the Task Forces life expired on the 31<sup>st</sup> December 2012.

### **3.2.0 The Implementation Mechanism**

#### **3.2.1 The Task Force on the Implementation of the Sexual Offences Act**

The Task Force on the Implementation of the Sexual Offences Act (hereinafter referred to as the Task Force) was set up by the Attorney General in 2007<sup>110</sup> to facilitate the implementation of the Act. The Task Force has thirty members drawn from a cross section of agencies that deal with law enforcement including the investigation, prosecution, health sector, children services amongst others.

The task forces terms of reference were to prepare and recommend a national policy framework and guidelines for the implementation of the Act which would facilitate uniform treatment of sexual offenders. Further to this, the Task Force was to recommend regulations for the implementation of the Act and also consider and recommend a comprehensive policy and propose effective measures, acceptable schemes and programmes for the protection, treatment

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<sup>110</sup>Vide Gazette Notice No. 2155 of 16<sup>th</sup> March 2007.

and care of victims of sexual violence as well as the treatment, supervision and rehabilitation of sexual offenders.

Of equal importance was the development of an intersectoral national action plan and coordination framework to promote, monitor and evaluate the effective implementation of the Act. The taskforce was also mandated to carry out such public education, awareness and sensitization programs or campaigns in order to adhere to and promote the objects of the Act. The Task Force had a lifespan of three years up to December 2010 which was extended up to December 2012.<sup>111</sup>

### **3.2.2 The Sexual Offences Regulations, 2008**

The Task Force facilitated the preparation of the sexual offences regulations which were gazetted in Legal Notice Number 132 of 2008. The rules guide the enhancement of sentences and the designation of medical officers who can handle victims under the Act. The rules also guide the maintenance of a register by the Registrar of the High Court for registration of the dangerous sexual offenders. The rules specify the data necessary to be included in the register and the persons authorised to access the register amongst other issues. Though these rules were gazetted in 2008, it is noteworthy that the installation of the register was operationalised on the 24<sup>th</sup> April 2012 by the office of the Chief Registrar of the judiciary.

### **3.2.3 Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations, 2008**

The Task Force facilitated the preparation of the sexual offences (Dangerous Offenders DNA Data bank) Regulations of 2008. These rules were gazetted in Legal Notice No. 133 of 2008 and designate the Director of Criminal Investigations (DCI) as the officer mandated to maintain the data bank. They also provide the nature of samples to be stored, how long they need to be maintained, and destruction of samples entry and removal of a name from the database amongst other issues.

It is however noteworthy that despite the presence of the rules, the operationalisation of the data bank by the police is yet to be operational<sup>112</sup> and as such the effectiveness of the Act is reduced.

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<sup>111</sup>The Task Force has requested the Attorney General to consider extending the mandate to enable it complete its mandate and a response is awaited.

<sup>112</sup> Supra note 34 above p. 33

### **3.2.4 Draft Rules under the Sexual Offences Act**

The Task Force was instrumental in preparing draft rules under section 47A of the Sexual Offences Act for consideration and operationalisation by the judiciary.<sup>113</sup> These rules, once gazetted, will provide a guide for the various provision of the Sexual Offences Act that need guidelines on how to proceed. These include treatment of vulnerable witnesses, provision for intermediaries and in camera proceedings amongst others. The judiciary needs to fast track the consideration of these rules to facilitate their timely gazettelement for use by the enforcers of the Act.

A perusal of the draft rules shows that the outstanding issues that need consideration under the Act have been covered. These include how age will be determined by courts, determination of vulnerable witnesses and appointment of intermediaries. Of importance is the provision for use of written statements by victims to intermediaries as evidence despite the hearsay evidence. This would therefore mean that the accused can proceed and cross examine the witness on the basis of the statement given. This should however be considered in light of the Evidence Act where the Act would require to be amended to be in conformity with the rules to avoid the process being challenged on appeal.

### **3.2.5 Public Awareness**

The Task Force had a mandate on creation of public awareness. This is a very wide area that cannot be effectively carried out by one single body. Noting that the Task Force had limited time to carry out sufficient public awareness, it is imperative that ever agency involved in enforcement and implementation of the SOA has a role to play in enhancing awareness of e provisions of the Act. It must be appreciated that despite the sensitization seminars and workshops carried out by the Task Force, the levels of awareness of public and some stakeholders still remain low. It is imperative that effective public awareness be created by concerted efforts at public education on the provisions of the Act and how they are enforced. Simplified versions of the Act should be prepared and circulated to the public to enhance their awareness of the Act.

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<sup>113</sup> The same were handed over to the Chief Justice on the 24<sup>th</sup> April 2012 for consideration.



The role of the media to create awareness of the Act should be effectively tapped. There are various radio stations that can utilise vernacular in the various spheres where they work to disseminate the contents of the Act in vernacular for people to better understand its provisions.

Simplified versions of the Act in Kiswahili and where possible various vernacular languages should be prepared and disseminated through the provincial administration to reach the people.

According to a study by the Washington Coalition of Sexual Assault Programs (WCSAP),

“... It is up to us to continue educating our communities about the realities of rape myths — that rape myths are not just a set of harmless beliefs, but are part of a larger destructive force that justifies violence in our culture. And when they really get that rape myths are painful, when they get that these myths are being applied to a child... hopefully then they will pause the next time they are about to say something disparaging about a rape survivor”<sup>114</sup>.

Rape myths are consciously being utilised by both perpetrators of the offences and the community to side line victims by placing blame squarely on their shoulders when offences are committed against them. This makes reporting of incidences minimal and complicates the drive against elimination of sexual violence against children.

Further, simplified procedures of what one should do to prevent themselves from being victimised and what action to take upon falling victims should be communicated to the public to assist in maintaining evidence when there is commission of an offence under the Sexual Offences Act.

There is need for the Ministry of Education to facilitate revision of the curriculum to provide basic information on the Sexual Offences Act and how to protect oneself or others from falling victim and how to obtain help upon being victimised. This would ensure that from an early age, children are given skills on how to protect themselves and seek help should they be victims of sexual violence. This would remove the stigma associated with sexual offences and enable people speak out and report when such offences are committed.

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<sup>114</sup>Janet Anderson, “Rape myths” *Research and Advocacy Digest*, Vol. 9, (2007):P. 3 available at <http://www.wcsap.org/sites/www.wcsap.org/files/uploads/documents/RapeMyths2007.pdf> last accessed 14/12/12.

### **3.3.0 The Enforcement Agencies**

#### **3.3.1 The Kenya Police Service**

The Kenya Police Service has the constitutional mandate alongside other agencies to investigate criminal matters reported to it. This means that the Penal Code and sexual offences fall under the jurisdiction of the police service. The process of investigation has several procedures which determine whether an offence has been committed or not. Each process, especially in relation to defilement, is crucial and thus the need to look at each stage critically.

It is important to note that the police service have a training manual on gender and human rights<sup>115</sup>. The manual exhaustively trains officers at the police training college on forms and mechanisms of dealing with sexual violence. The officers are given practical knowledge on how to handle survivors of sexual offences with emphasis on values of sensitivity, privacy and promptness in handling the survivors.

All newly recruited officers undergo the training on the skills and this requires commendation of the police service. However investigations can be carried out by any officer and there is need for all officers involved in investigations to undergo refresher courses to get sensitised on how to effectively investigate sexual offences to facilitate consistency in the manner in which sexual offences are handled.

##### **3.3.1.1 Complaint recording**

Any person aggrieved by the conduct of another starts the criminal justice processes by filing a complaint with the police. In defilement cases, the victim usually accompanied by a parent, guardian or person in authority will report to the nearest police station. At the police station, they go to the report office where an officer listens to them and determines the next course of action. Due to the sensitivity of defilement cases, most police stations have set aside a desk where the report can be taken in a confidential manner.

However, the Agency for Cooperation in Research and Development (ACORD) notes,

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<sup>115</sup> The same was developed in 2001 and revised in consultation with FIDA Kenya to cater for developments in the law especially after the passing of the Sexual Offences Act in 2006. available at [www.fidakenya.org/wp-content/uploads/2013/08/police\\_manual.pdf](http://www.fidakenya.org/wp-content/uploads/2013/08/police_manual.pdf) last accessed 16/11/13.

“...even though women’s and children’s desks exist in almost all police stations, their effectiveness is limited by a variety of reasons. Most of the officers responsible for the gender desks have not received training on gender responsive crime management, neither do they possess skills of handling survivors of defilement (sic) such as, counseling or referral. Further, the resources are minimal to equip and train the police officers so that they can effectively manage the gender desks.”<sup>116</sup>

This is vital as it will determine whether the complainant will be confident enough to disclose what happened. Further, if the same is manned by a male officer whose attitude is affected by his cultural beliefs on defilement, then the complainant may be judged harshly and may never go beyond the first stage. When a victim is made to feel like they are the cause of the problem or that they deserved what happened for whatever reason, then that will be the end of the process as they will share the violation with any other person.

It is at this stage that the officer determines whether an offence has been committed and the next course of action to be taken. If the officer believes an offence has been committed, he will refer the victim to hospital for medical examination. This is by issuing the P3 form. The P3 form is the document that is filled by a medical officer after examination and is produced in court as proof of any injuries that may have been noted or as an opinion by the doctor on whether defilement had been committed or not.

The situation on the ground however, is that not all reports are made at the police station. Many reports are made to the village elder. The elder may refer the matter to the chief who then may refer the complainant to the police station. In this chain, sometimes the process can take even three days before the victim reaches the police station. This affects the nature of evidence as any samples that may be taken thereafter depend on passage of time.

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<sup>116</sup>ACORD Kenya, *Kenya: An Audit of Legal Practice on Sexual Violence*, (2009) page 20 available at: <[www.acordinternational.org](http://www.acordinternational.org)> last accessed on 21/8/13.

A report by the Legal Resources Foundation supports this contention,

“Should cases be revealed, reports are mostly received by the chief or elders. The chiefs sometimes do assist women in reporting the matter to police by helping them draft written statements. However, the challenge is that women often file a report days after the event, and the evidence may already be lost. Most cases, however, are exclusively settled within the community as this is the preferred method of dealing with them by community power holders.”<sup>117</sup>

It is recognized that children, like all members of society, are brought up in communities that have different value systems. There are many cultures that have values that uphold harmful practices such as defilement and early marriages in children. Amongst the coastal communities, their traditional justice systems are usually engaged in the case of sexual violence. In cases of defilement, the child survivor would be asked if the man should marry her, in addition to receiving a maximum of Kshs. 4,000/=.<sup>118</sup> In such traditional justice systems, the following questions emerge: What about the rights of the child? Why should she marry somebody who has violated her and showed no respect for her dignity and degraded her?

Amongst the Turkana, where a girl is defiled, the elders allow the girl's family to severely beat the man. The perpetrator is then supposed to slaughter two oxen for the girl's family. Indeed their culture informs them that the defilement of a girl is less serious than rape of a married woman as more focus is on protecting existing family institutions than on alleviating the adverse effects of defilement on girls.<sup>119</sup>

As reflected above, majority of defilement cases are initially reported to the leaders at the village level. This chain of reporting also determines the fate of any complaint that the victims may have. If an elder or the chief does not believe that defilement is a serious offence, he will call the parties together and try to solve the matter out of court by encouraging compensation. The chief is a very key figure in the society and there are victims' guardians or parents who may feel their authority is final and may not challenge their decision.

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<sup>117</sup> Bonita Ayuko & Tanja Chopra, *The Illusion of Inclusion: Women's Access to Rights in Northern Kenya*, Legal Resources Foundation, (2008), p. 28 available at [http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/Chopra\\_Illusion\\_of\\_Inclusion\\_Womens\\_A2\\_Rights\\_in\\_Northern\\_Kenya.pdf](http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/Chopra_Illusion_of_Inclusion_Womens_A2_Rights_in_Northern_Kenya.pdf)> last accessed on 26/8/13.

<sup>118</sup> ACORD Kenya, *Pursuing Justice for Sexual and Gender Based Violence in Kenya: Options for Protecting and Compensating Survivors of Sexual and Gender Based Violence*, page 37, available at [www.acordinternational.org](http://www.acordinternational.org)>last accessed on 15/6/13

<sup>119</sup> Ibid p. 38

A report by Kenya Legal and Ethical Issues Network on HIV & AIDS (KELIN), however, recognises that culture and cultural structures for mediation of disputes plays a key role in settlement of issues at the community level. According to them,

“In cases of rape or defilement, elders must not be encouraged to enter into local settlements with violators. Instead, encourage interventions that will send the message of community disapproval to such acts; their actions should be geared towards ensuring that perpetrators are punished for their crimes”.<sup>120</sup>

According to the supplementary report filed in relation to Kenya’s implementation of the Convention on the Rights of the Child, there was evidence that the child minders (police and administrative officers) frequently intimidate and manhandle the children victims, leaving them feeling helpless and unwanted. They come out of the system badly shaken and traumatised.<sup>121</sup> Though the initial report was filed in 2001, this was before critical steps had been taken in the realm of children’s rights. The Children Act came into force in 2001 and the Sexual Offences Act in 2006. The second report was examined by the Committee on the Rights of the Child in 2007.<sup>122</sup> This was barely one year after the enactment of the Sexual Offences Act and it would be imperative that the 3<sup>rd</sup> report which is still pending is filed so that a proper analysis can be taken on the status of the implementation of the Sexual Offences Act. This will enable a reflection on whether the child minders and administrative officers’ attitude in handling children victims had changed so as to become more effective in ensuring that the victims are heard and their rights enforced when they get into contact with them.

It is important that the implementation process addresses the grassroots reporting mechanism so that at the lowest reporting levels, citizens are advised on how to handle incidences of defilement once they occur. Some sensitization was done after the passage of the Act but more needs to be done as it is at the grassroots that we will win or lose the fight against defilement in Kenya. In this respect, it is recommended that there is increased public education and awareness of the chiefs, elders and those engaged in the informal justice system in dispute resolution to

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<sup>120</sup>Catherine MuyekaMumma ,*Accessing Justice and Protecting the Rights of the vulnerable Through Cultural Structures: On Working With Elders in Communities*, Kenya Legal and Ethical Issues Network on HIV& AIDS (KELIN), 2010, Page 14 available at [www.kelinkenya.org](http://www.kelinkenya.org) last accessed 21/8/13.

<sup>121</sup>Kenya Alliance for Advancement of Children, *Supplementary Report to Kenya’s First Country Report on Implementation of the UN Convention on the Rights of the Child* (2001) Carolina Academic Press. p. 37-39.

<sup>122</sup>The report is available at [http://www2.ohchr.org/english/bodies/crc/docs/44stat\\_kenya.pdf](http://www2.ohchr.org/english/bodies/crc/docs/44stat_kenya.pdf) last accessed on 27<sup>th</sup> July 2013.

appreciate the rights based approach in arbitrating disputes to avoid violating the rights of the persons seeking help before them. Further, a referral mechanism should be facilitated for the informal justice system to refer the matters outside their jurisdiction to the formal justice sector for solution.

It is notable that how police handle reports made by victims of crime and especially sexual offences is no longer going to be a secret affair in their offices. The High Court has ruled that failure by the police to conduct prompt and timely investigations into complaints by victims comprises a breach of their fundamental rights for which they will be held accountable. The court found , “the police in the instant petition ,by failing to conduct prompt, effective, proper, corrupt free and professional investigations into the petitioners complainants, and demanding payments as preconditions for assistance, whether for fuel or P3 forms or whatever the case might have been, violated petitioners right to access of justice and right to have disputes that can be resolved by the application of law decided in a fair and in public hearing before court of law in accordance with Article 50(1) of the Constitution of Kenya, 2010.”<sup>123</sup>

### **3. 3.1.2 Issue of P3 forms**

In Kenya, any person who claims to have been defiled or assaulted must be examined by a doctor. The doctor then fills a document called a P3 form detailing their observations and opinion as to whether there was injury or for defilement, penetration or attempted penetration. These P3 forms are in the custody of the police service and once a victim reports an offence and the report officer determines that an offence has been committed, he issues the P3 form. The victim then presents themselves to a doctor for medical examination and filing of the P3 form. It is the obligation of the victim to take back the P3 form to the police station for their determination as to what offence has been committed and to determine what charges, if any, to file in court.

This process is fraught with many issues. For defilement victims, their parents or guardians determine whether they will return the P3 form to the police or use it as bait for the accused to

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<sup>123</sup>C.K.A (a child) through Ripples International as her Guardian and Next Friend) & 11 Others Versus Commissioner of Police/Inspector General of the National Police Service & 3 Others [2013] eKLR.

negotiate with the family of the deceased. In the circumstances, many of the times the issue is determined without consideration of the best interests of the child and without considering the long term effects of the offence on the child.

The attitude of the officer who receives the report equally determines whether in the first place, the victim will be issued with a P3 form or not. Should the officer be of the view that defilement is not a serious issue to warrant charges being filed; a P3 form will not be issued. Rather, the officer will be at the forefront organising meetings between the families of the victim and the accused to facilitate reconciliation. At other times, the officer may send the parties to the chief with the information that the issues are domestic matters which should be settled out of court. A report by ACORD Kenya concurs that this is inferior justice in that the objective of referring the matter for mediation to the chief is to seek cultural punishment, which is by far more lenient than what is imposed by regular courts. Such police actions have no legal basis and the eventual penalty declared by the chief lacks a regular means of enforcement. The acts only put into disrepute the disparaged dignity of the survivors.<sup>124</sup>

Where the child has been defiled by a caregiver or a parent, the police may culturally feel that the child is jeopardising their survival by reporting their source of livelihood. A report by ACORD shows that some police officers are indifferent to the plight of the survivors due to their cultural orientation. They put off the survivors and questions why they intend to take 'their source of livelihood' to court. Female police officers are no better, and often term the assailant's prosecution as spousal betrayal on the part of the survivors.<sup>125</sup> It is therefore clear that there ought to be proper control by way of guidelines to the officers and the local administration on the nature of cases that can be sent for reconciliation so that serious cases such as defilement can be left with the right authorities. Further, it should be made mandatory for a P3 form to be issued for all defilement victims to facilitate a doctor examining them and concluding on whether or not they have been defiled. Once the form is filled, the form should be returned to the police for the next process. Action should be taken on guardians of minors who withhold the P3 forms from the law enforcement authorities.

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<sup>124</sup>Acord Kenya, *Pursuing Justice for Sexual and Gender Based Violence in Kenya: Options for protecting and compensating survivors of sexual and gender-based violence*, page 43, available at, [www.acordinternational.org](http://www.acordinternational.org) last accessed on 21/9/13.

<sup>125</sup>Ibid p. 47.

### 3.3.1.3 Handling of requests to withdraw cases

The Sexual Offences Act<sup>126</sup> provides that once a case has been filed in court, only the Director of Public Prosecutions can authorise its termination or any investigations being carried out. This provision was to provide for an oversight by an independent entity from the investigator so that only deserving cases are removed from court.

The situation on the ground however varies in that in most cases, the withdrawal occurs even before the case has been filed in court. Once the P3 forms are filled and it is disclosed that an offence has been committed, errant officers and parents start the negotiations for payment of compensation for the defilement on the victim. Some parents or guardians follow their culture and agree that the victim should be married off to the suspect after they are paid compensation. It is usually at this stage that most of the cases are dealt a blow. Once the parents have made up their mind that they want compensation, the child victim will be whisked away to live with the other relatives as negotiations take place. If the P3 form had been surrendered to the police, the child will never be availed for testimony before court.<sup>127</sup>

Unfortunately in most cases the suspect will approach the parents of the victim immediately after the offence and offer to compensate. In such instances, the parents are blinded and do not report to the authorities. Eventually and after the passage of time, the suspect may withdraw from the compensation negotiations as they are aware that no evidence can be traced to them. Any injuries that were evident on the victim may have since healed and basically the case collapses.

It is important for all parents and community members to be sensitised on the procedures that need to be carried out should a child fall victim to defilement. Once they are aware of what they should do, they will check on each offence as this will inform how tomorrow's victims will be handled. It is also important for the people to be warned of the offences that can be withdrawn and the ones that cannot be withdrawn and the effects of a withdrawal of the charges. Once they are aware of the operation of the law, they will be keen not to jeopardise the rights of their children.

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<sup>126</sup>Section 40, SOA.

<sup>127</sup>Supra note 101 Page 29.



#### 3.3.1.4 The Charging Decision

Once the police are satisfied that there is sufficient evidence to file charges in court, they file charge sheets in court which formally starts the trial process in court. The process of drafting charges is very technical and often a case can falter on the basis of defective charge sheets.

There have been instances where accused persons have been charged with the wrong charges only for the matter to be prosecuted to conviction and the conviction set aside on appeal. This is especially critical for defilement charges where age determines which section the charges are to be filed under. In *Charles Muli vs. R*<sup>128</sup>, the accused, a police officer, was charged with defilement of a six year old victim. Though there was conclusive evidence of age of victim, the charges were framed under section 8(3) of the Sexual Offences Act instead of section 8(2). The High Court on appeal in considering arguments by the appellant that the charge was wrongly framed considered that the error was not prejudicial and upheld the conviction. These are errors however that should not be left to the mercy or discretion of the appellate court.

In another instance in the case of *Justin Nyaga Mungai vs. R*<sup>129</sup> the accused had been charged with defilement of an imbecile contrary to section 7 of the sexual offences Act. A perusal of section 7 of the Act clearly shows that the offence as charged does not exist. Section 7 deals with offences committed in view of family members or persons with disability. Had the court been diligent in the case, it would have dismissed the charges under the Criminal Procedure Code<sup>130</sup>. The court however proceeded with the case and eventually convicted the accused with the offence of defilement of an imbecile contrary to section 145 of the Penal Code.<sup>131</sup>

This case presents the dilemma of the police when it comes to filing charges. It is important that proper training is availed to the officers to ensure they are able to draft charges appropriately to avoid loss of cases on technicalities.

Related to the charging decision is the need to avail evidence on the age of the victim. Defilement in the SOA is graduated according to age of the victim and age is an ingredient that must be proved. As at time of charging the police must ensure they have admissible evidence on age of victim.

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<sup>128</sup> 2013 eKLR.

<sup>129</sup> 2013 eKLR.

<sup>130</sup> Section 89 Criminal Procedure Code Cap 75 Laws of Kenya.

<sup>131</sup> Cap 63 Laws of Kenya.

The nature of evidence required to prove age has been a determinant factor in appeals at the High Court. The police have been availing birth certificates for victims in defilement cases. The High Court has at times declined to convict where no birth certificate has been produced. This causes alarm as not many people especially in the rural areas have birth certificates. The High Court in *Flappyton Mutuku Ngui vs. R* found that,

“Conclusive proof of age in cases under the Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases but other modes of proof are available and can be used in other cases”<sup>132</sup>

In some cases the court has accepted school admission records, baptismal cards and immunization cards<sup>133</sup> as sufficient to prove age in defilement cases. Where no such documents are available to prove age, the most reasonable thing for the police to do is to present the victim for age assessment and present the report to court<sup>134</sup>.

The journey of sufficiently proving age of defilement victims has been tedious and it would be prudent to consider harmonising the offence of defilement to do away with the ages set under sections 8 and have the offence of defilement created as one offence where all one would require to prove is that the victim was below 18 years. This would be a consistent manner of handling defilement cases and encourage uniformity of decisions.

### **3.3.1.5 Bonding of witnesses**

Once a defilement or related sexual assault against a child is filed in court, the case is set down for hearing. It is the duty of the police service to avail witnesses to attend court for the hearing of the case. This is usually done by bonding witnesses or summoning them to come to court.

As a result, the police who filed the charges will determine who attends court to prove the charges. In many cases, the complainant who does not attend severely invites the wrath of the court as the case may be thrown out for lack of witnesses. Where the police have made up their mind that a case should be settled out of court, then this matter may never reach court. The police will desist from bonding witnesses which may eventually lead to an acquittal of the accused for non attendance of witnesses. In other instances, the police bond witnesses through

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<sup>132</sup> Machakos High Court Criminal Appeal No. 296 of 2010.

<sup>133</sup> B.W.S. vs. R, (2013) eKLR.

<sup>134</sup> Hamisi Ngoli Kusala vs. Republic, (2013) eKLR.

the phone. During statement recording, all details of the witnesses should be taken to facilitate their eventual bonding. However, in most of the cases, only the mobile number is recorded. Where the victim's family reside in towns, movement from one estate to another reduces their chances of being traced as only the mobile number is left. With only a phone number as a reference, all one needs to frustrate a case is to discard their phone number and replace it with another at minimal cost and their traces are erased.

In other instances, the victims are kept away from their usual residence by their caregivers frustrating the hearing of their cases. In the case of *Baraki Leahey Oyoo vs. R*<sup>135</sup>, the accused had been charged with defilement of a minor and released on bail. After the case started, the victim was reportedly missing. The prosecution accused the victim's mother of colluding with the accused to frustrate the case and asked for the accused and the mother to be detained in custody until the victim was produced which request was granted by the trial court.

Though the decision was set aside by the High Court on revision for failure to follow due process in detaining the accused and the mother of complainant, the case is a clear representation of the frustration that the prosecution faces in court due to collusion of victims parents and the accused persons. Where the complainant does not testify, then the case cannot stand. It is recommended that at statement recording stage, proper details including taking copies of the identity cards of the witnesses of the caregivers can give the police an alternative mode of tracing the witnesses to avoid derailment of cases.

### **3.3.2.0 The Office of the Director of Public Prosecutions (ODPP)**

The Constitution 2010 creates an independent office of the Director of Public Prosecutions (hereinafter referred to as ODPP) which has the mandate to prosecute all criminal offences including defilement within the republic.<sup>136</sup> Before this, the prosecutorial mandate was vested upon the Attorney General. The ODPP is a new office which is still in the process of operationalising.

The ODPP has the mandate to direct the Inspector General of the Police to investigate any reports of defilement and upon conclusion of investigations, hand over the report to the Director

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<sup>135</sup>(2013) eKLR.

<sup>136</sup>Article 157 of Constitution of Kenya.

of Public Prosecutions for prosecution or any other appropriate recommendation.<sup>137</sup> Though the ODPP has the mandate to prosecute, historically due to lack of sufficient officers to prosecute cases, the majority of the prosecutions were being conducted by the police prosecutors. The cases at the High Court, Court of Appeal and the Supreme Court are handled by prosecution counsel.

This situation has not been ideal and in the strategic plan of the then department of public prosecutions within the office of the Attorney General, there was a proposal to professionalise public prosecutions by ensuring that matters are prosecuted by professional advocates.<sup>138</sup> This process has been ongoing and until to date, modalities are still being negotiated for the immediate absorption of all police prosecutors currently prosecuting so that the deficit can be filled through recruitment. The delay in this process means that majority of the cases filed in court are investigated and prosecuted by the police. This has created some tension especially where the witnesses claim intimidation by the investigating officer and the prosecutor who are both police officers. Despite the above state of affairs, the ODPP has made progress in facilitating the trial of sexual offences as outlined below.

#### **3.3.2.1 Creation of a specialised prosecution unit on sexual and gender based violence.**

The office of the DPP has a sexual offences and victims' rights division which handles offences in respect of sexual and gender based violence. This division specifically studies files submitted in relation to sexual and gender based violence and determine on sufficiency of evidence to mount or continue prosecutions already filed in court or to discontinue them. Where judgements and rulings have been delivered the officers in the division analyse them and determine the necessity to appeal or file revisions to correct any injustices in administration of justice.

Further and more related to sexual offences, the unit works in liaison with the witness protection agency division also under the ODPP on issues relating to protection of witnesses. The unit has been engaged in sensitization of stakeholders on the Sexual Offences Act by holding workshops all over the country.

The impact of this division in the successful implementation of the Sexual Offences Act will be reviewed after the full operationalisation of the ODPP. In the meantime, due to capacity

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<sup>137</sup> Article 157 of Constitution of Kenya.

<sup>138</sup> ODPP Strategic Plan 2011-2015.

constraints, it is noteworthy that the majority of prosecutions under the Sexual Offences Act are carried out by police prosecutors who prosecute the bulk of prosecutions in the Magistrates Courts.

### **3.3.2.2 Policy on prosecution of sexual offences**

The Constitution gives the Director of Public Prosecutions the mandate to give guidelines in the prosecution of criminal matters. The enactment of the Office of the Director of Public Prosecutions Act<sup>139</sup> has given direction in the manner in which prosecutions are to be carried out in the country. The Act also guides how investigators are to relate with the prosecutors so that there is no conflict of interest.

The Constitution<sup>140</sup> and the ODPP Act requires that communication between the investigating agencies and the prosecutorial authority must be in writing. This facilitates transparency and accountability in the manner in which cases are investigated, taken to court and eventually prosecuted.

The Act requires the DPP to give guidelines on what offences are to be prosecuted by the various cadres of prosecutors available in the country. With regard to the sexual offences, the DPP has developed the Prosecutor's Reference Manual on the Sexual Offences Act, 2006<sup>141</sup> and a code of conduct for prosecutors. These documents give the legal and policy framework on the handling of sexual offences and act as a training tool and reference material for those prosecuting sexual offences. They are also aimed at enhancing the capacity and competence of prosecutors to more effectively and efficiently handle and prosecute cases involving sexual offences while also equipping the prosecutor with the special skills necessary to relate with victims of sexual violence and vulnerable witnesses. The prosecution policies and guidelines are currently undergoing review to align them with the Constitution 2010.

Though the guidelines have been in place for about six years, their dissemination has been a challenge. The same were launched in the year 2007 but it is not clear whether the prosecutors and investigators in the ground actually apply the guidelines. It is therefore recommended that further dissemination of the guidelines to all incoming counsel and prosecutors and sensitisation

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<sup>139</sup>Act No. 2 of 2013 which became operational on the 16<sup>th</sup> January 2013.

<sup>140</sup>Section 32 of the ODPP Act No. 2 of 2013.

<sup>141</sup>The manual was developed in collaboration with Women in Law and Development in Africa (WILDAF) and launched in 2007.

of all counsel and prosecutors should be done regularly to facilitate the proper administration of the guidelines and to ensure that there is consistency in the prosecution of sexual offences in the country.

### **3.3.2.3 Appeal against irregular acquittals**

The Criminal Procedure Code gives power to the Director of Public Prosecutions to challenge in the High Court any acquittals that raise points of law.<sup>142</sup> This ensures that there is another forum which can look into the process and determine whether the case was properly handled by the court and give remedies that are appropriate such as a retrial of the case.

In sexual offences, there are various instances that would warrant an appeal against the decision to acquit an accused person. However, in most of the times, the Director of Public Prosecutions who has the legal mandate to appeal does not get to know of the outcome of a matter. The complainant in the case may not be aware of the procedure of appeal should they feel that they have not been availed justice. Where the prosecutor has contributed the acquittal either by failing to bond witnesses, they do not inform the DPP of the outcome of the appeal. In cases where the prosecutor or the investigating officer have colluded with the accused person to frustrate the attendance of witnesses leading to acquittal, it is imperative that in public interest the decision, if not well founded, be appealed against.

It is recommended that every acquittal in relation to defilement cases or sexual offences must be communicated to the Director of Public Prosecutions immediately the decision is made to facilitate the request for the proceedings to determine whether an appeal would be necessary. Further, there is need for creation of awareness among the stakeholders such as the members of public and nongovernmental organisations dealing with defilement matters to inform the DPP of the outcome of these acquittals immediately to facilitate the process of appeal if need be. This will sensitize the investigators, prosecutors and judicial officers that their decisions will be reviewed should they not comply with the law. This will facilitate access to justice for the victims of defilement. It will also send an appropriate message to the accused persons who interfere with the cases pending in court that they will be pursued long after the acquittal and brought back to face the law.

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<sup>142</sup>Section 248 of the Criminal Procedure Code, Cap 75 Laws of Kenya.

### 3.3.2.4 Appointment and gazettement of prosecutors

The Director of Public Prosecutions (DPP) has the mandate to appoint public prosecutors who he delegates the prosecutorial function to facilitate the fulfilment of his mandate. For purposes of the sexual offences, the main body of prosecutors is made up of the police prosecutors and prosecution counsel. In line with the ODPP's strategic focus to professionalise prosecution services, there is a dire need to have more prosecution counsel appointed to prosecute the sexual offences. There has been an ongoing request for more funding for the ODPP to reach optimal capacity to facilitate the timely and effective prosecution of offences in Kenya. A report by the standard media captures the current state of affairs of staff levels at the ODPP<sup>143</sup> and notes that "According to a report presented to Parliament's Departmental Committee on Justice and Legal Affairs by Tobiko, the ODPP is currently operating at a mere 27.8 per cent of the optimal staff establishment. The current in-post of legal staff is a mere 161 against an optimal requirement of 927, which translates to 17.4 per cent, while that of the non legal staff is currently 198 against an optimal level of 364"<sup>144</sup>

Often, prosecution involves an adversarial contest between the advocates for the accused persons and that of the state prosecutor. There has been an imbalance between the skills of the public prosecutor and those of the advocates for the accused person. Where there is improper admission of evidence or technical legal issues are raised, sometimes the prosecution suffers due to the inadequate legal skills. Usually, the defence wait for the case to be concluded and file an appeal which succeeds as the high court will always enforce the law.

Further, the general attitude of the population is that the police who investigated the case are the same who are prosecuting in court. If the complainant had been mistreated or harassed during the investigation process due to the attitude of the investigating officer, the same fear and trauma will accompany the victim to the court where they are required to be stable so as to strike the court as credible witnesses. There is therefore an urgent need to hasten the absorption of the police prosecutors into the ODPP office so that they are perceived as part of the civilian prosecutors and not an extension of the investigative team.

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<sup>144</sup>Standard Digital News, "DPP Keriako Tobiko cries foul over budget allocation," Saturday June 22, 2013 available at <[http://www.standardmedia.co.ke/?articleID=2000086585&story\\_title=dpp-cries-foul-over-budget-shortfall](http://www.standardmedia.co.ke/?articleID=2000086585&story_title=dpp-cries-foul-over-budget-shortfall)> last accessed 12/8/13.

A further look at Legal Notice Number 17450<sup>145</sup> which gazetted the police prosecutors reveals that out of the 305 gazetted, only 33 are female. Where there are female victims in a sexual offence, the victim may not be so comfortable narrating her ordeal before a court that may also have a male judicial officer, a male prosecutor and even a male court clerk. The victim may feel like she is in the world alone. There is need to have a gender balance in the prosecutorial function so that where necessary, a prosecutor who is friendly to the victim can be availed.

However the DPP should be commended for his appointment of advocates of the High Court to be public prosecutors for purposes of prosecuting offences under the Sexual Offences Act and gender based violence cases starting from the magistrates' courts all the way to the Court of Appeal.<sup>146</sup> Though the number of gazetted advocates stands at 18 which is still low, this is a step in the right direction to supplement the few prosecution counsel available to prosecute in the lower court. The DPP should consider gazetting more Advocates in all parts of the country to prosecute cases where the prosecutorial capacity is minimal.

### **3.3.3.0 The Ministry of Health**

The Ministry of Health plays a critical role in facilitating access to justice for victims of sexual offences. Key amongst this has been the development of national guidelines for the management of sexual violence in Kenya which were initially issued in 2007 and revised in 2009. These guidelines have guided the medical personnel by giving them standard procedures which must be applied in managing victims of sexual violence. The guidelines provide a framework for ensuring consistency in management and handling of victims, evidentiary requirements and psychosocial support for the victims. The various stages at which the health professionals play a role are discussed as hereunder.

#### **3.3.3.1 Initial contact with victims**

After a victim of a sexual offence reports a complaint to the police, it is assumed that they will be referred to a medical facility for a medical examination. The medical personnel are tasked with the responsibility of examining the victim and their findings assist in determining whether an offence has been committed and the nature of charges to file in court.

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<sup>145</sup>The gazette was issued on the 7<sup>th</sup> December 2012.

<sup>146</sup> This was done on 10<sup>th</sup> October 2012 through Gazette Notice Number 14724 available at Kenya Law .org.



The government has given a boost to the fight against defilement by removing the monetary charges for the medical examination of sexual offences victims<sup>147</sup>. This ensures that irrespective of social status, a victim can still be facilitated to access justice. Despite the progress made in this process, there are still many bottlenecks that need to be addressed. There are instances when the examining medical personnel examine a victim and discover that she has a venereal infection but the examination ends there. It is important that should such a case presents, the medical officer should recommend that the suspect is brought for examination so that further tests can be carried out to see whether the suspect could have transmitted the disease to the victim<sup>148</sup>. Where this is not done, it defeats the cause of justice. In other instances, the examining medical officer may notice the presence of spermatozoa in the vaginal tract of the victim and no further tests are done to match these with the suspect's.

It is important that there is a coordinated approach by the medical personnel in their handling of sexual violence victims. The procedures to be carried out should be documented and consistently followed all over the country so that irrespective of where a victim seeks help, the processes are similar. Medical examination on child victims should be sensitively handled so that small bits of evidence are not ignored. Where a further examination is deemed necessary after the initial visit, the same should be documented especially to follow up on whether any sexually transmitted infections could have been passed on to the child. The manifestation of the infection may not be observed immediately after the defilement.

### **3.3.3.2 Filling the P3 and Post Rape Care (PRC) forms**

Once the victim has been examined, the doctor is further requested to fill in their observations in the P3 form which is the legal document that will be presented in court to prove the injuries noted on the complainant. The law requires that the person who fills the P3 form should present it in court and assist the court in interpreting its findings.

In many instances, the doctor who attends to the victim initially does not fill the P3 form but fills a post rape care (PRC) form. The PRC form<sup>149</sup> is a medical form filled when attending to the survivor. The form allows space for history taking, documentation and examination. It facilitates

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<sup>147</sup> The Sexual Offences (Medical Treatment) Regulations, 2012 gazetted in Legal Notice Number 133 of 16/11/2012, available at <<http://www.kenyalaw.org/klr/index.php?id=1119>> last accessed on 24/8/13.

<sup>148</sup> This should be considered in light of the fact that the Medical Treatment Regulations of 2012 also avails free treatment services for the suspect.

<sup>149</sup> This was developed by the Ministry of Health to facilitate the management of sexual violations and is contained in the Ministry of Public Health and Sanitation: Ministry of Medical Services, National Guidelines on Management of Sexual Violence in Kenya, 2nd Ed. 2009.

filling of the P3 form by ensuring that all relevant details are taken at the first contact of the survivor with a health facility. The PRC form strengthens the development of a chain of custody of evidence by having a duplicate that can be used for legal purposes and showing what specimen were collected, where it was sent and who signed for it. The PRC form can be filled by a doctor, a clinical officer or a nurse. The Sexual Offences (Medical Treatment) Regulations, of 2012<sup>150</sup> have facilitated the health practitioners to fill in the post rape care form for survivors of sexual violence. The PRC form can be filled by a registered nurse, a medical doctor or a clinical officer whereas the P3 form could only be filled by the police surgeon.

The PRC form assists in filling a P3 form that is the legal document used in court. Often the latter form will be filled by any other doctor who is available to fill the document. This would mean that at the trial the accused may demand for the doctors who attended the victim and who filled the P3 form to attend. It is recommended that where possible, the person attending the victim at the first instance should fill the P3 form as they are best suited to translate their examination observations on the P3 form. Further, this would require that the P3 forms are distributed in the various health facilities so that once they treat a victim of a sexual offence; they fill in the form as they treat the victims.

This would enhance accountability as there are instances when a doctor has filled in a P3 form using the treatment notes of a fellow doctor and on the actual hearing date in court, disowns the treatment notes and cannot even recognise who wrote them. This creates inconsistencies and contradictions in the evidence which lead to unnecessary acquittals.

This is evident In *Republic vs. John M. Kioko*<sup>151</sup> case. The accused faced charges of defilement contrary to section 8(2) as read with 8(3) of the Sexual Offences Act. In the alternative he faced charges of indecent act with a child contrary to section 11 of the Sexual Offences Act. After full trial he was acquitted of the charges on 24<sup>th</sup> June 2013. The trial court faulted the medical evidence placed on record in an effort to corroborate the complainant's testimony. The medical officer who testified only participated in filling the P3 form. He could not confirm from the medical officer who had examined the complainant and filled in her treatment notes. In actual fact he disowned the treatment notes. The court was unable to rely on that evidence which created doubt as to whether in deed the complainant had been examined and by whom.

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<sup>150</sup>The same were issued through legal notice number 133 dated 16/11/12 by the Minister for Public Health and Sanitation.

<sup>151</sup>Makueni Principal Magistrates Court Criminal Case No. 11 of 2012(unreported).

Despite the injustice caused by the decision, no appeal against that acquittal could be sustained as even the initial investigating officer did not testify to clarify on among other issues the mix up in the exhibits which went unexplained during the proceedings. This goes to show that the role of the medical officers who treat the victims of sexual offences should be taken seriously as their evidence is critical in proper determination of cases.

There is, however, a discord between the health care providers' in terms of filling the P3 and PRC form. Most of them opt to fill in the P3 form as it is usually the one admitted in court as evidence. There is therefore a need to ensure that the PRC form is gazetted and its hierarchy with the P3 form determined. The PRC form can be filled by any medical officer whereas the P3 form can only be filled by the police surgeons who are very few in the country.

### **3.3.3.3 Collection of samples and handling – chain of custody**

According to a report by Human Rights Centre University of Berkley<sup>152</sup>, most victims of sexual violence seek medical treatment for purposes of clinical care. During examination, any forensic evidence that may assist in tracing the perpetrator of the offence may be noticed. In many hospitals there is a rape tool kit which is a standardised package of medical supplies that facilitates in collection of forensic evidence. The samples collected are submitted to a laboratory for analysis. According to Kim Athuuy, passage of time affects the collection of samples as any samples in a sexual assault case must be collected within 72 hours. The sensitization of people on how to handle themselves after an alleged sexual assault also affects the nature of evidence available as taking a bath or even visiting the bathroom before examination may affect the nature of evidence available.<sup>153</sup>

To avoid re-traumatisation and humiliation of victims, Kim proposes that the medical officer initially attending the victim for clinical management should also collect the forensic samples to avoid subjecting victims to more than one examination.<sup>154</sup> There is a lot of sense in this proposition in Kenya as shown in the Kioko case.<sup>155</sup> You will find instances where a victim has had to be examined by two or three medical officers and every time she or he has to go through

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<sup>152</sup>Kim Athuuy Seelinger, et al, *The Investigation and Prosecution of Sexual Violence: Sexual Violence and Accountability Project Working Paper Series*, Human Rights Center University of Berkley, 2011, page 29.

<sup>153</sup> Ibid p. 31.

<sup>154</sup> Ibid.

<sup>155</sup> Supra note 13.

the same procedures. This re-traumatizes victims and causes most of them to shy away from talking about the experience in court when their voice is much needed to be heard.

Even in instances where forensic evidence is collected in a timely manner, there could be delays in the submission and eventual testing of the samples. This leads to destruction of evidence which further compounds the success of these cases. In Kenya, there is a lot of delay in the government chemist laboratory where all samples in Kenya are deposited for testing. The delay leads to a backlog of the cases in court leading to injustice.

Even in the developed world, the problem of delay in testing rape kits still persists. A report by Human Rights Watch in 2009 reported that Los Angeles County had the largest known rape kit backlog in the United States. As of January-February 2009 there were at least 12,669 untested rape kits in Los Angeles County's 88 cities<sup>156</sup>. The numbers in Kenya could be much higher as there is no official tally but it is a pointer to the concerted efforts needed to tackle the backlog of collected samples that remain untested for long as the cases pile in court.

In Kenya, there is a lot of delay experienced in testing the samples submitted to the Government Chemist laboratory for testing. In the report by the Task Force on Implementation of the Sexual Offences Act,<sup>157</sup> the Government Chemist office reported that despite there being offices in Nairobi, Mombasa and Kisumu that can generate forensic evidence, only the Nairobi office was equipped to generate DNA analysis.<sup>158</sup> This required samples requiring DNA analysis to be transported to Nairobi from all over the country. This creates backlog in generation of reports and generally in the timely conclusion of sexual offences cases pending before court. It also contributes to the destruction of samples enroute especially those that have not been properly preserved.

It is recommended that the capacity of the Government Chemist laboratory be enhanced to be able to effectively handle the workload. The department should be properly funded to be able to effectively maintain its equipment and obtain the necessary supplies to carry out timely analysis of submitted samples.

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<sup>156</sup>Human Rights Watch, *Testing Justice: The Rape Kit Backlog in Los Angeles City and County* (2009) page 47 available at <<http://www.hrw.org/sites/default/files/reports/rapekit0309web.pdf>> last accessed on 29/7/13.

<sup>157</sup>Comprehensive Report, Sexual Offences Act Implementation Workshop, 2011, p. 20.

<sup>158</sup>Ibid p. 20.

The Government Chemist laboratories in Kisumu and Mombasa should be upgraded to be able to handle all kinds of analysis including DNA sampling to reduce the need to travel to Nairobi and clog the laboratory in Nairobi.

#### **3.3.3.4 Attending court to give evidence**

Medical personnel who attend to sexual assault victims are often required to attend court and testify and inform court about the results of their examination. As they are expert witnesses, the rules of evidence require that the makers of the reports attend court to testify and produce their reports. As they also provide essential services, they are torn between being at the hospital and in court especially due to the shortage of doctors in hospitals. The priority goes to saving lives leaving many sexual assault victims with no person to present their reports in court.

The Evidence Act<sup>159</sup> provides that reports of an expert can be produced in court for evidence without requiring them to be in attendance unless the court is of the view that that the attendance of the expert is necessary to avoid injustice. Rarely is this section invoked as the accused person always insists that the medical officers must attend court and should the court not accede to their request, which would be a major ground for appeal. Through the court users forum,<sup>160</sup> courts have set aside specific days when the medical personnel can attend court and produce all the reports within a specific court. This saves time where an officer can attend court and even produce reports of their colleagues subject to legal provisions in the Evidence Act.<sup>161</sup>

As discussed above, there is need for better coordination between the medical profession, the legal and investigative agencies to appreciate what each agency expects from the other for a successful prosecution and management of victims of sexual offences. The post rape care form and the P3 forms should be harmonised so that there is no multiplicity of documents. This may explain why in some cases you will find post rape care forms alongside the P3 form while in others there is only one form. With the guidelines issued by the Ministry of Health on management of victims, there should be no guesswork on what needs to be done.

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<sup>159</sup>Section 77 of the Evidence Act, Cap 80 Laws of Kenya.

<sup>160</sup>This is a forum where criminal justice players meet regularly to deliberate on how best to remove hurdles affecting timely delivery of services in the courts. It has been entrenched in law and gives a voice for all players to be involved.

<sup>161</sup>Section 33 of the Evidence Act Cap 80 Laws of Kenya.

#### **3.3.4.0 The Judiciary**

Judicial authority is exercised on behalf of the Kenyan people by the courts of Kenya<sup>162</sup>. The judiciary plays a key role in enforcement of the rights of Kenyans and with regard to sexual violations to enhancing access to justice for both victims and perpetrators of offences. It is in courts that people charged with violating the Sexual Offences Act and other penal laws are presented for the hearing of their cases. It is in courts that victims recount to judicial officers of their harrowing experiences for a determination of whether their accounts are credible to sustain charges filed in courts. The role of the judiciary in enforcing the sexual offences law is discussed under various headings as hereunder:

##### **3.3.4.1 Taking of pleas**

Every person charged with an offence is presented to the criminal justice system by way of filing of charges in court. The charge sheet defines the law the offender is alleged to have violated and the sentence section which outlines the likely sentence should the accused be found guilty of the offence. The accused is required in law to plead to the charges wherein the charges are read out to him or her and they answer to the charges either by the acceptance of the charges leading to a guilty plea or the denial of the charges leading to a not guilty plea.

There are instances where the accused persons have pleaded guilty to charges and they are convicted upon acceptance of the facts as read out by the prosecutors. This is a welcome approach as it saves court the time to be spent calling witnesses to prove charges. It is also a welcome gesture for the victims as it avails them closure as the accused accepts having wronged them and can face the consequences of their actions.

However, there has been a trend where the accused opt to plead guilty to the charges and are processed immediately but as soon as they are out, they file appeals citing non-compliance with the law. In light of the technical provisions of the Sexual Offences Act, it is imperative that the court first confirms that the charges are admissible under the Criminal Procedure Code.<sup>163</sup>

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<sup>162</sup> Article 159 of the Constitution of Kenya 2010.

<sup>163</sup> Section 89 of the Criminal Procedure Code requires the court to confirm that the charges are admissible and if not direct their amendment or discharge the accused.

### **3.3.4.2 Handling victims in court**

The trial process is the ultimate truth seeking process and the participation of the victim is essential. This, however, must be looked at in light of the likelihood of invasion of the privacy of the victim and the need to prevent humiliation and re-traumatisation. In an adversarial system, the face-off between the victim and the accused has on several occasions made victims to remain mute and unable to communicate with the court. However, the Sexual Offences Act has provided several measures that can be used to ease the trauma on a victim witness.

#### **3.3.4.2.1 Privacy**

The Sexual Offences Act provides for proceedings in court especially relating to the complainant to be held in camera. This ensures that the victim is afforded some privacy from the rest of the public as she or he recounts their experience. In a majority of proceedings, the complainants in offences under the Sexual Offences Act testify in camera and the judiciary and the prosecutors must be lauded for enforcing the provisions of the Sexual Offences Act in this respect.

It is however noted that despite directing proceedings to be held in camera, for the minors and specifically children of tender years, even facing the accused in camera has not contributed to their being heard as most are still unable to express themselves while directly facing off with the accused. The Sexual Offences Act foresaw this situation and provided for a remedy. This is the remedy of declaring the witnesses as vulnerable and proceedings under the cover of a witness box.<sup>164</sup>

A witness protection box would enable the victim to testify without close proximity to the defendant and as discussed by Kim Thuuy Seelinger<sup>165</sup>, a witness protection box can include amongst other simple ways, installing temporary screens in the courtroom to shield the victim from the defendant. This is not as cost consuming as installation of closed circuit television which would require more resources. This has not been explored in many cases and should be given consideration.

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<sup>164</sup>Section 31, SOA.

<sup>165</sup> KimThuySeelinger, Helene Silverberg and Robin Meija ,*The Investigation and Prosecution of Sexual Violence: Sexual Violence and Accountability Project Working Paper Series*, Human Rights Center of University of California Berkeley (2011) p. 47.

It is noteworthy that the aspect of witness protection boxes is a new concept in Kenya which requires time to be assimilated and utilised. It would be relevant for further research to be carried out to assess whether the same have been applied in any courts and their effectiveness and how best to utilise this provision. The draft Chief Justice Rules under Section 47 of the SOA would need to clarify the nature of witness boxes envisaged so that there is consistency and uniformity in their application.

The enforcement of section 31 of the Sexual Offences Act is dependent on the court or the court prosecutor. However, since the witnesses belong to the prosecution, the prosecution should take a more proactive role in ensuring that they bring to the attention of the court the vulnerability of the witnesses so that the court can proceed. In the adversarial court process, the court must be moved and therefore expecting the court to act *suo moto* may be counterproductive.

### **3.3.5 Witness Protection Services**

The successful prosecution of a case depends on the availability of witnesses and their willingness to give a proper and full account of what happened. Sexual offences by their nature are very sensitive and with the penalties provided by the SOA have far reaching consequences.

The security of witnesses becomes a focal issue as instances when witnesses have been threatened and influenced not to attend court to testify abound. It is therefore imperative that victims and witnesses in sexual offences be secured before, during and after testifying in court. This can only be achieved by having a comprehensive witness protection framework to cater for justifiable cases.

The Witness Protection Act<sup>166</sup> provides for protection measures for witnesses in criminal cases. It provides facilities for guidance and counselling alongside vocational training. The discretion to act is on the Attorney General. This however poses a problem as sometimes people who really need to be considered for protection are not in touch with the agency mandated to carry out witness protection assessment. To make the programme effective, the funds should be managed by the Witness Protection Agency in consultation with actors in the criminal justice system such as investigating officers of a case, the Non-Governmental Organisations (NGOs) dealing with children's rights amongst others. The investigating officers and prosecutors who are in touch

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<sup>166</sup>Cap 79, Laws of Kenya.



with the witnesses and who understand their needs should play a central role in applying for protection orders for witnesses who are vulnerable.

The Witness Protection Agency is a new organisation which came into being in the year 2011 having been officially launched in August 2011. As such; it is still in its infancy and needs a lot of support to ensure it is properly facilitated to carry out its mandate effectively. In line with devolution, the Agency should ensure that its services are available in every county to facilitate access of its services. To facilitate its carrying out its role of securing witnesses required to testify in court, the Agency requires to be properly funded to carry out its role effectively and facilitate in administration of justice.

### **3.4 Conclusion**

This chapter analyzed the policy framework, the implementation mechanism and the institutions mandated with enforcement and implementation of the laws on defilement in Kenya. The analysis has shown that the implementation model envisaged by the Act is still not operational. The Task Force report recommended the setting up of an independent authority to oversee the implementation of the Act. To date such an authority has not been set up. Of equal importance, the Task Force came up with a policy that would guide the implementation of the Act to facilitate uniform application of the Act. The policy is still pending cabinet approval so that it can be published and disseminated.

Though the institutions enforcing the Act have critical roles to play that are interdependent, there is little coordination and collaboration amongst them. This reduces their capacity to share information on areas of concern making the implementation and enforcement of the Act disjointed.

This proves the hypothesis for the study that the implementation and enforcement of the SOA is ineffective thus reducing the capacity of the act to protect children from defilement and punish perpetrators of the offences.

The agencies especially the investigation, prosecution and health ministry are not well funded to enable them give priority to cases of sexual offences. In terms of training and capacity, the agencies are challenged. There are still limited cases being prosecuted by professional advocates due to the budgetary constraints of the Office of the Director of Public Prosecutions. Frequent

transfers of police officers means those who had been trained in investigation of sexual offences can be deployed across the various departments in the police service leaving challenges to the investigation of such cases.

In line with the second hypothesis of this research, the implementing and enforcing agencies of the SOA have limited capacity to effectively enforce the said Act. Further training, funding and institutional reengineering is required to enhance the capacity of the institutions to make them responsive to the needs of victims of defilement.

## **CHAPTER FOUR**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **4.1 Conclusions**

The analysis of the international conventions, the Constitution and national laws on defilement has demonstrated that there is a legal framework for protection of children from defilement. However, there is need for the laws on marriage to be amended to align the age of consent for marriage with that of the conventions and the Constitution that defines a child as one below 18 years. The disparity in the age of marriage creates confusion as the SOA treats any sexual relations with a minor as an offence whereas some marriage laws will allow a 16 year old to be married with the consent of their parents.

Further, the SOA requires to be amended to incorporate the offences under section 145 of the Penal Code with necessary definitions of the mental incapacitation to ensure proper and humane definitions are given and specifically to limit the use of the words “idiot” and “imbecile”. The SOA also requires amendment to provide for a minimum sentence for the offence of incest so as to harmonise the minimum sentences provided.

The analysis of the implementation and enforcement agencies of the SOA has shown that there are various agencies that have been working to ensure the provisions of the SOA in protecting children from defilement have been enforced and implemented. There is however little coordination and collaboration amongst the agencies. This means that many reports initially reported to the police service for investigation cannot be accounted for to determine how many went for examination, how many ended up in court and how many were effectively prosecuted. This is further complicated by lack of reliable statistics on the cases. This makes it difficult to properly analyse each agency to determine whether they have effectively carried out their roles.

Further, some reports made at the investigation stage are withdrawn by the parents after they are offered compensation by the accused persons using informal justice system. This frustrates cases filed in court as the victims are not presented in court to testify leading to unwarranted acquittals of the accused. This promotes impunity and sends the wrong signal to society that crime cannot be properly punished.

The provisions of the SOA are technical and training for the agencies enforcing and implementing the Act has not been consistent. Every agency carries out its training depending on its need. This means that training is not harmonised across all the agencies to ensure that the agencies are at par in terms of training to ensure that the requirements of the SOA in terms of handling victims and accused at all stages from complaint recording to trial and sentencing are upheld for consistency. There must be regular and mandatory training for officers involved in law enforcement and implementation such as police officers, judicial officers, prosecutors amongst other stakeholders. This training should be aimed at enhancing their skills and addressing attitudes and stereotypes in relation to sexual offences that affect the enforcement the Act

Further, it has emerged that victims of sexual offences are at times subjected to various examinations at different stages of the reporting cycle. This promotes further traumatising and unnecessary intrusion into their privacy. Where possible there should be one stop centres at least in the county headquarters where a victim's needs can be addressed, samples taken, counselling done and the P3 and PRC forms filled to avoid causing them to make more than one trip to the hospitals and police stations.

The private and confidential handling of victims of defilement must be upheld as provided in the law all the way from the reporting stage to sentencing. The gender desks in police stations must be attended by properly trained officers who can address and refer to victims to the right institutions. Where possible there should be a liaison officer in police stations to link the victims to the health providers and even provide transport to reach the health facility in a timely manner.

The witness protection framework has not been effectively utilised to cater for witnesses testifying in defilement cases. This should be enhanced and devolved to the counties so that those who merit inclusion into the programme can be identified and processed in a timely manner. Currently the Witness Protection Agency is only located in Nairobi and therefore out of reach for many Kenyans. Devolution of these services is very essential especially for marginalised people who may never have a chance to access the currently centralized service

The much anticipated register of the dangerous offenders was launched by the Honourable the Chief Justice on the 24<sup>th</sup> April 2012. This was seven years after the enactment of the Sexual

Offences Act. Much needs to be done to ensure that those who deserve to be recorded in the register are included there to prevent future victimization of the victims by serial offenders.

Though the rules under Section 47A of the Act have been formulated, the Chief Justice has not facilitated their gazette to guide the proper enforcement of the SOA. There is urgent need for the Chief Justice to liaise with stakeholders to have the same subjected to stakeholder and public participation to facilitate the full enforcement of the Sexual Offences Act.

The Task Force on the Sexual Offences Act has made much progress in putting up the policy framework and guidelines for the implementation of the SOA. However, the Task Force's life came to an end in December 2012 and their report and recommendations have not been implemented. This means that the policy framework and the proposed Authority that is supposed to take up the role of coordinating and facilitating the enforcement of the Act is yet to be put in place.

The Task Force initially carried out sensitisation workshops to facilitate public awareness of the contents of the Sexual Offences Act. Noting that awareness creation should be a continuous process and not a one time event, priority should be given to more rigorous campaigns to increase more public awareness of the Act and specifically to avoid settlement of cases through compensation as this is negating the intention of the SOA.

## **4.2 Recommendations**

### **1. Amendment of the law**

There is need for amendment of the SOA to provide for offences against people with mental challenges so that the Penal Code can be repealed to bring the offences under section 145 under the purview of the SOA in line with the intention of the Parliament to have the SOA deal with all sexual offences. Section 20 of the SOA should be amended to provide for a minimum mandatory sentence for incest with minors to reduce the discretion on sentencing.

The age of consent for marriage should be amended to 18 across all laws to harmonise the definition of a child as provided in the conventions and the Constitution. This will ensure that no minors are sexually violated in the guise of marriage when their parents give consent for them to be married while still minors especially after they have been sexually violated and the accused persons have settled the cases with their parents.

## **2. Need for training**

The study revealed that attitude plays a big role in determining enforcement and implementation of the laws in relation to defilement. It is recommended that concerted training for investigators, prosecutors, medical personnel, Judges, Magistrates and other stakeholders to remove the stereotypes and enhance awareness of the effects of defilement on victims and society in general. Equally training on best practices in investigation, prosecution and adjudication of cases would greatly reduce incidences of defilement in Kenya.

## **3. Enhanced Interagency Cooperation and Collaboration**

Information sharing and dissemination amongst the investigators, prosecutors and the health sector who are critical in determining the strength of a case that ends up in court is paramount. It is recommended that there should be increased operational contact and sharing of information between law enforcement agencies and the implementing agencies. Further, there should be consultation to ensure that necessary budgetary allocations are made for each agency's task however mundane to facilitate its carrying out of its role.

## **4. Devolution of services**

The need for devolution of services especially in relation to protection of witnesses cannot be gainsaid. The Witness Protection Agency should ensure that it has its presence in each county to facilitate uptake of its services by those who need the same. This will ensure security of witnesses who need to testify in sensitive cases and where they may have been threatened by the accused persons.

## **5. Enhanced capacity of Government Chemist**

It is recommended that the capacity of the Government chemist laboratory be enhanced to enable it effectively handle the workload. The department should be properly funded to be able to effectively maintain its equipment and obtain the necessary supplies to carry out timely analysis of submitted samples. The laboratories in Kisumu and Mombasa should be upgraded to be able to handle all kinds of analysis including DNA sampling to reduce the need to travel to Nairobi and clog the laboratory in Nairobi.

#### **6. Setting up of DNA database**

The Director of Criminal Investigations (DCI) should fast track the setting up of the DNA database for storage of specimen for convicted offenders to facilitate tracing of serial offenders in future. The delay in setting up the database shows that since the inception of the Act in 2006, no progress has been made by the investigating agency to track serial defilers as the records of those who have since been convicted and their key information is not captured as desired.

#### **7. Lobbying for approval and dissemination of the National Policy on Administration of the Sexual Offences Act**

The national policy on sexual offences and guidelines there under require to be expeditiously approved to enable publication and dissemination for the public to be aware of its contents. The stakeholders' involved in enforcement of the Act should lobby for this approval to enable the rolling out of the programs envisaged by the policy. In the alternative, the Attorney General should extend the lifespan of the Task Force until the policy and the NAASO have been approved and set up respectively.

#### **8. Dissemination of the Sexual Offences Act**

There should be further dissemination of the Sexual Offences Act in Kiswahili and major vernacular languages through the media including and not limited to the radio, television and internet, and publication of flyers and information bulletins to further create awareness to the public on the contents of the law and where to find help in case of sexual offences occurring. Further to this, the chiefs should utilise public meetings to sensitise their subjects on the contents of the Act and its processes and procedures. Budgetary allocation should be made for these meetings and their effectiveness evaluated continuously.

### **4.3 Recommendations for further research**

The research was hampered by lack of time to carry out field research on some of the issues highlighted. It is recommended that further research be carried out on the issues highlighted especially on the effect of attitude on the implementation of the Act. It would be important to speak with stakeholders to identify what needs to be done to facilitate change in attitude and facilitate proper enforcement of the Act.

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